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BOOK II.

OF RIGHTS OF PROPERTY—(*continued*).

PART II.

OF THINGS PERSONAL.

CHAPTER I.

OF THINGS PERSONAL IN GENERAL, AND OF PROPERTY THEREIN, IN GENERAL.

"THINGS personal" fall under the older and more general denomination of *chattels*, or *goods and chattels* (*a*), the term "chattel" being also applicable to *chattels real* (*b*), which, although they are "personal property," are really interests in real estate, and have consequently been considered in the First Part of the present Book. The

(*a*) Co. Litt. 118 b. (*b*) Co. Litt. *ubi sup.*

chattels to which our attention will now be directed include only *moveables*, and the rights connected with moveables which, to distinguish them from chattels real, are known as *chattels personal* (*c*).

Things personal, then, comprise in the first place all sorts of things moveable, that is, such as may attend a man's person wherever he goes; and, being consequently for the most part of a perishable quality, were not esteemed of so high a nature, nor paid so much regard to by the early law, as things that are in their nature immoveable and more permanent, such as land and houses and the profits issuing thereout. [In fact, during the feudal ages, the amount of personal estate was comparatively very trifling, *e.g.*, a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion of all the moveables of the subject, was frequently laid without scruple; and forfeitures were occasionally inflicted by the common law of *all* a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to have deserved so severe a punishment. But in modern times, through the extension of trade and commerce, and the progress of the arts and sciences, personal property has greatly augmented both in amount and in quality; and our courts now attach to it an importance equal to that which they attach to real property.

Moveables consist, in the first place, of *inanimate* things, such as goods, plate, money, and the like; or vegetable productions, such as the fruit or other parts of a plant, when severed from the body of it, or the whole plant itself when severed from the ground; and under the name of moveables, we have also to include *animals*, which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another. There are also certain rights in respect of moveables, which are deemed chattels personal,

(*c*) Co. Litt. 118 b.

[such as *patent rights*, *copyright*, the right to a *trade-mark* or *trade-name*, the right to a *design*, and the right to a debt; all of which will, in due course, be considered.

But directing our attention, for the present, to animals,—these, when regarded as the subjects of ownership, are distinguished into such as are *domitæ naturæ* and such as are *feræ naturæ*, some being of a tame, and others of a wild, disposition. In the case of animals *domitæ naturæ*, *i.e.*, such animals as are of a nature tame and domestic, such as horses, kine, sheep, poultry, and the like, a man may have as absolute a property in them as in inanimate things; because they continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property in them. But with animals *feræ naturæ*, the case is different. These are, generally speaking, not the subjects of absolute property, at least while living (*d*). But under certain circumstances a man may be invested with a qualified or special property in them, and this either *per industriam*, or *propter impotentiam*, or *propter privilegium*.

1. Such a property may arise in them *per industriam*; that is to say, either by *reclaiming* and making them tame by art, industry, and education, or else by so *confining* them that they cannot escape and use their natural liberty. Some writers have ranked all the domestic animals we have mentioned under the head of animals *feræ naturæ*, apprehending none to be originally and naturally tame, but only made so by art and custom; inasmuch as horses, swine, and other cattle, if originally left to themselves, would have chosen to rove up and down seeking their food at large, and are only made domestic by use and familiarity, and are, therefore (say they), called *mansueta*, *quasi manui assueta*. But however well this notion may

(*d*) *Hannam* v. *Mockett* (1824), 2 B. & C. 934; *Reg.* v. *Read* (1878), 3 Q. B. D. 131.

[be founded, abstractedly considered, our law apprehends the most obvious distinction to be between such animals as we generally see tame, and seldom, if ever, find wandering at large, which it calls animals *domitæ naturæ*, and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*: though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Instances of these are deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, fish in a private pond, bees when hived, and the like. And with regard to bees, in particular, it has been said, that, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests therein; and therefore if another hives them, he shall be their proprietor. But a swarm which fly from and out of my hive are mine, so long as I can keep them in sight and have power to pursue them; and in these circumstances no one else is entitled to take them. But it has also been said, that with us the only ownership in bees is *ratione soli*; and the Carta de Forestâ, which allowed every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found (*e*).

With respect to all animals *feræ naturæ*, they are no longer the property of a man than while they continue in his keeping or actual possession. If at any time they regain their natural liberty, his property in them instantly ceases, unless indeed they have the *animum revertendi*—which is only to be known by their usual custom of returning (*f*)—or unless instantly pursued by the owner,

(*e*) *Carta de Forestâ* (ed. Stubbs), c. 13; *Hannam* v. *Mockett* (1824), 2 B. & C. 944.

(*f*) Bract. l. ii. ch. 1; Inst. ii. 1, 15.

[for during such pursuit his property remains.] On the other hand, a property of this description is protected, while it lasts, by law, so that an action for damages will lie against any one who detains animals *ferœ naturæ* from the owner for the time being, or who unlawfully destroys them (*g*). And it is penal to steal those animals *ferœ naturæ*, which, being fit for food or for the service of man, are either tame and known by the thief to be so, or are so confined that the owner can take them whenever he pleases (*h*). And although, as regards animals kept only for pleasure, curiosity, or whim, amongst which the common law classed dogs and singing birds (*i*), no protection was at one time afforded by the law, still, by modern legislation, efficient protection is now given to property in all species of confined animals (*k*). And it appears, that *hawks* were peculiarly protected even by the common law (*l*).

Incidentally here, attention may be called to a statute recently passed relating to the treatment of wild animals, *i.e.*, the Wild Animals in Captivity Protection Act, 1900.

2. [A qualified property in animals *ferœ naturæ* may arise also *propter impotentiam*, that is to say, on account of their own inability. Thus, when hawks, herons, or other birds build in my trees, or coneys or other creatures *ferœ naturæ* make their nests or burrows in my land, and have young ones there, I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires (*m*). For, in these cases, the law vests a property in the owner of the land in respect of the young, in the same manner as it does of the parents if reclaimed and confined; for these cannot, through weak-

(*g*) Bro. Abr. *Trespass*, 407.
(*h*) 1 Hale, P. C. 512; 2 Bl. Com. 390; Hawk. b. i. ch. 33, s. 26.
(*i*) Lamb. *Eiren.* 275.
(*k*) *Vide post*, bk. VI. ch. VII.
(*l*) 1 Hale, P. C. 512; 1 Hawk. P. C. 38.
(*m*) 7 Rep. 17 b.

[ness, any more than the others through restraint, use their natural liberty, and forsake him.

3. Lastly, a qualified property in animals *ferœ naturæ* may arise *propter privilegium* ; that is to say, a man may have, in exclusion of other persons, the privilege of hunting, taking, and killing certain animals *ferœ naturæ*. There is a transient property in such animals (usually called *game*), so long as they continue within one's own liberty or on one's own land, and the owner of such liberty or land may restrain any stranger from taking them therein. But the instant they depart into another liberty, the qualified property of the prior owner ceases (*n*).]

Passing now from the consideration of animals *ferœ naturæ*, to the consideration of personal property generally, we will first observe, that chattels personal may be either *choses in possession*, or else *choses in action*,—a distinction which is attended with certain important consequences in the law. *Choses in possession* are those chattels of which a man has the enjoyment either actual or constructive. They are divided into two kinds, according to whether one has an *absolute* or a *qualified* property in them. In the former case a man is fully and completely the proprietor or owner of the thing ; in the latter case his ownership is of a special or limited kind. Of *special property*, as exemplified in the case of animals *ferœ naturæ*, we have already spoken. [But the phrase *special property* (sometimes called also the qualified property in chattels personal) has another and more important meaning, which may be illustrated by the case of *bailment*. This is when chattels are delivered by the owner thereof to another person for a particular purpose, for instance, to a carrier to convey to London, or to an innkeeper to secure in his inn, or the like. Here there is no absolute property for all purposes in either the bailor or the bailee. For the bailor has only the right, and not the immediate possession ;

(*n*) *Blades* v. *Higgs* (1866), 11 H. L. C. 621.

[and the bailee has the possession, but only a temporary *right*. There is therefore a qualified property in them *both*; and each of them is entitled to an action against any stranger by whom the goods are wrongfully damaged or taken away,—the bailee on account of his immediate possession and the special property incident thereto, the bailor on account of his general ownership (*o*);] but save as against the bailee, the absolute property for all purposes remains in the bailor. Similarly, where goods are acquired by *finding*, the finder has a special property therein, defeasible, it is true, upon discovery of the rightful owner, but in the meantime valid against the rest of the world (*p*),—treasure-trove being, of course, excepted (*q*), and also chattels which (although not treasure-trove) are found buried in the land of any third person (*r*). On the other hand, a servant who has the care of his master's goods—as a butler of plate, a shepherd of sheep, and the like—has not any property therein, either absolute or qualified, but only a mere charge or oversight (commonly called "custody") of the goods; and his master's property therein remains absolute (*s*). And when goods are distrained for rent, no property, special or otherwise, is acquired in them by the party distraining or seizing; but they remain *in custodiâ legis*, until sold or otherwise lawfully disposed of, and in the meantime the property of the original owner remains in him unaltered (*t*). But, if goods be taken in execution, the sheriff or other officer executing the process has a special property in them during the interval between the seizure and the actual sale, though the absolute property remains in the debtor (*u*).

(*o*) *Coggs* v. *Bernard* (1704), 1 Sm. L. C. 167.

(*p*) *Armory* v. *Delamirie* (1722), Str. 505; *Bridges* v. *Hawkesworth* (1852), 21 L. J. Q. B. 75.

(*q*) Bk. IV. pt. I. ch. VII.

(*r*) *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44.

(*s*) 3 Inst. 108.

(*t*) 2 Saund. by Wms. 47, n. (c).

(*u*) *Giles* v. *Grover* (1831), 1 Cl. & F. 72; Sale of Goods Act, 1893, s. 26.

With regard to *choses in action*, these are things of which a man has not the possession (either actual or constructive), but merely the right to recover it by action. They comprise not only corporeal things not in possession of the owner, but also incorporeal chattels which have only a notional existence, such as debts, stocks, shares, debentures, and patent and trade-mark rights. [Thus, money due on a bond is a *chose in action*, for there is a right to claim the money when payable; but there is no possession of it, until it is recovered by course of law, or until payment be first voluntarily made. And so, if a man promise or covenant with me to do any act, and fail in it, whereby I suffer damage, the recompense for this damage is a *chose in action*. For though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by law, and possession can only be given me by legal judgment and execution.] And, generally, whenever a man has a right to recover recompense, whether for breach of contract or for any wrong or tort committed, he is said to be entitled to the recompense as a chose in action; and therefore a *chose in action* is a thing rather *in potentiâ* than *in esse*, though the owner may have as absolute a property in, and be as well entitled to, things in action, as to things in possession (*x*).

[Property in chattels personal, whether in possession or in action, is also subject to distinctions which regard the *quantity* of interest. For a man may have the total property of a chattel, analogous to the fee simple in a real estate, or he may be the owner of it for life only, or for years only. But there cannot be an estate tail in chattels personal; and, therefore, if they be given by deed or will to A. and the *heirs of his body*, the total property is vested in A., and the remainders over take no effect (*y*). This rule

(*x*) *Colonial Bank* v. *Whinney* (1885), L. R. 11 App. Ca. 426. (See *post*, ch. v. sect. XII.)

(*y*) *Seale* v. *Seale* (1715), 1 P. Wms. 290.

[applies also to the case of leaseholds so limited (*a*). But if a personal *annuity* be limited to A. and his heirs or the heirs of his body, A. will in that case have a fee simple conditional at the common law (*b*).

Personal chattels also, like land, are subject to distinctions with respect to the *time of enjoyment*, and the *number of their owners*. And, first, as to the time of enjoyment. By the rules of the ancient common law there could be no future property in chattels personal created so as to take effect in expectancy; because, owing to their being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would have occasioned perpetual suits and quarrels, if such limitations in remainder were *generally* tolerated or allowed. But yet in last wills and testaments, such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted (*c*). Originally this indulgence was only shown when merely the *use* of the goods, and not the goods themselves, was given to the first legatee (*d*), the property being supposed to continue all the time in the executor of the testator. But now these distinctions are practically disregarded (*e*); for if a man, either by deed or will, limits his books, furniture, or other chattels to A. for life, with remainder over to B., this remainder is good,—if not as a remainder strictly so called, at all events as an executory interest, which for this purpose is the same thing (*f*).] The only exception to this rule is the case of things *quae ipso usu consumuntur*, a gift of which to a person for life will vest in him the absolute ownership. Personal chattels, however, cannot

(*a*) *Lerenthorpe* v. *Ashbie*, Rolle's Abr. 831, pl. 1.

(*b*) *Earl of Stafford* v. *Buckley* (1751), 2 Ves. sen. 171.

(*c*) *Stevenson* v. *Liverpool* (1875), L. R. 10 Q. B. 81.

(*d*) Mar. 106.

(*e*) 2 Freem. 206; *Randall* v. *Russell* (1817), 3 Meriv. 195.

(*f*) Fearne, *Cont. Rem.* p. 402.

by any method be rendered unalienable beyond the period prescribed by the law against perpetuities, which applies to limitations of interests in personalty as well as interests in real estate (*g*). They also fall, equally with real estate, within the provisions of the Accumulations Act, 1800 (commonly known as the Thellusson Act), and the Accumulations Act of 1892 (*h*), the general effect of which two Acts is (we may remember) to invalidate all directions, whether by will or other instrument, for the accumulation of the annual produce of property for any longer time than one of the alternative periods specified in the Acts.

[Second, as to the number of owners. Things personal as well as things real, may belong to their owners, not only in severalty, but also in joint tenancy, or as tenants in common. They cannot, however, be vested in coparcenary, because the beneficial interest in them does not descend from the *ancestor* to the *heir*, which is necessary to constitute coparceners. If a horse or other personal chattel be given to two or more absolutely, they are joint tenants thereof; and, unless the joint tenancy be severed, the same doctrine of survivorship takes place as in estates in lands and tenements (*i*). In like manner, if the joint tenancy be severed, as by either of them selling his share, the vendee and the remaining part-owner become tenants in common, without any *jus accrescendi* or survivorship (*k*). So, also, if £100 be given by will to two or more, *equally to be divided* between them, this makes them tenants in common, as we have formerly seen the same words to have done in regard to a devise of real estate (*l*). It is, however, well established that chattels and other kinds of personal property, as well as real property, belonging to several persons carrying on business in partnership are to be considered as common, and not as

(*g*) Co. Litt. by Harg. 20 a, n. (5); Gilb. *Uses*, by Sugd. 121, n. (4); *sup.* vol. I. p. 335.

(*h*) *Sup.* vol. I. p. 337.

(*i*) Litt. s. 281.

(*k*) *Ibid.* s. 321; *cf. Re Wilks*, [1891] 3 Ch. 59.

(*l*) *Vide sup.* vol. I. p. 207.

[joint property ; and there is no survivorship therein (*m*). This principle is expressed in the maxim "*Jus accrescendi inter mercatores non habet.*"]

It remains to add, that, as in the case of things real, so in the case of things personal, the legal property may be vested in one man, to the *use* of or in *trust* for another. For instance, stocks, shares, and other choses in action, as well as, more rarely, choses in possession, are frequently assigned to trustees by way of settlement on marriage or otherwise. Of course the Statute of Uses does not apply to personal property at all.

(*m*) *Waterer* v. *Waterer* (1873), L. R. 15 Eq. 402.

CHAPTER II.

OF TITLE TO THINGS PERSONAL—AND FIRST OF TITLE BY OCCUPANCY.

WE shall now proceed to consider the *title* to things personal, or the various means of acquiring and of losing such property as may be had therein. Both of these considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is, for the most part, impossible to contemplate the one without contemplating the other also. Now there are six modes of making title to things personal, which we shall have occasion to consider, and these are:

1. By occupancy;
2. By invention;
3. By gift and assignment;
4. By contract;
5. By bankruptcy; and
6. By will and administration.

[And, first, the title by OCCUPANCY,—which, we have more than once remarked, was the original method of acquiring property; and which is still permitted to subsist in certain cases.

1. Thus, in the first place, it was formerly said, that anybody may seize to his own use such goods as belong to an alien enemy (*a*); for such enemies, not being looked upon as members of our society, are not entitled, during their state of enmity, to the benefit or protection of our laws. This doctrine is, however, in modern times,

(*a*) Finch, *Discourse*, 178.

[restrained, as regards seizures on the high seas, to such captors as are authorized by the authority of the Crown (*b*) ; and, as regards inland seizures, to such goods as are brought into this country by an alien enemy, after declaration of war, without a safe-conduct or passport. And therefore it has been held, that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized (*c*) ; and if a contract be made with a foreigner during peace, the right of action upon it is not absolutely forfeited by the subsequent outbreak of war between his country and ours, but is simply suspended until peace be again restored (*d*). But where the circumstances of the case render the capture from an enemy legal, the title by capture, *i.e.*, by occupancy, is good ; and so good in fact, that, by our more antient law, such title would sometimes have prevailed, even against the claim of the former true British owner, from whom the goods had been previously taken by the same enemy. For the law of this country in such a case was, that goods and chattels so re-captured became vested in the recaptor, unless the recapture was on the same day as the first capture, and the owner before sunset put in his claim to them (*e*) ; a doctrine agreeable also to the law of nations, as understood in the time of Grotius (*f*). But the law of recapture at sea was much modified after the time of Grotius ; and the later authorities required, that, before the goods became the property of the captors, they must have been brought into port, and have continued a night *infra præsidia*, in a place of safe custody (*g*), and, further, that, in order to vest such property in the captors, so as to bar the title of the

(*b*) *The King* v. *Williamson* (1672), Freem. 40.

(*c*) Bro. Ab. tit. *Propertie*, 38, *Forfeiture*, 57.

(*d*) *Clemontson* v. *Blesig* (1856), 11 Exch. 135 ; *Flindt* v. *Waters* (1812), 15 East, 260.

(*e*) Bro. Ab. tit. *Propertie*, 38, *Forfeiture*, 57.

(*f*) *De Jure B. ac P.* l. 3, ch. 6, s. 3.

(*g*) Bynkersh. *Quæst. Jur. Pub.* b. 1, ch. 4.

[original owner thereto, the vessel must have been condemned *as prize*, by legal sentence (*h*).] As regards British owners, according to the present law, whatever period of time may have intervened between the capture and any such claim, and whether sentence of condemnation of the vessel shall have been obtained or not, the goods must in all cases be restored to the original owners on payment of *salvage*, or money in lieu of salvage, according as shall have been determined in the Admiralty Division of the High Court of Justice (*i*) ; and the same rule would probably be applicable also to all owners who for the time being were subjects of the King. On the other hand, as regards captures from the enemy (that is to say, from alien owners being enemies), goods so captured are called *naval prize of war ;* and the title thereto and the distribution of such goods is now regulated by the Naval Prize Act, 1864, under which all questions are referred to the jurisdiction of the *Prize Courts*. This jurisdiction is now ordinarily exercised by the Admiralty Division of the High Court of Justice (*k*), and may (in certain cases) be exercised by the Colonial Courts of Admiralty (*l*).

2. [Again, with regard to animals *ferœ naturæ*, all mankind had an original natural right to pursue and take any fowl of the air, any fish of the sea, and any beast of the field ; and this right still continues in every individual, except so far as it has been restrained by the laws of the country. By the law of England, accordingly, all persons may, generally speaking, on their own lands, or on the high seas, exercise this right, though it was formerly the exclusive right of the monarch to take certain royal fish, such as the whale and sturgeon. Animals so captured

(*h*) 1 Rob. Rep. 139 ; 3 *ib.* 97 ; 1 Kent. *Com.* 97.

(*i*) 1 Bl. Rep. 27 ; Admiralty Court Act, 1840.

(*k*) See Holland, *Manual of Prize Law.*

(*l*) Colonial Courts of Admiralty Act, 1890 ; Prize Courts Act, 1894.

[by a private individual become, subject to the conditions already mentioned, his *qualified* property, or, if dead, his *absolute* property; so that to steal them, or otherwise invade his property therein, is, according to the nature of the case, sometimes a criminal offence, sometimes a civil injury.] But the right to take animals *feræ naturæ* is subject to many arbitrary restrictions and regulations imposed by the legislature, such as the restrictions and regulations contained in the Game Laws; and the statutes severally passed for the protection of *sea-birds* and certain other wild birds (*m*), of *sand-grouse* (*n*), and of *fresh-water* fish (*o*), and *shell-fish* generally (*p*). Inasmuch as the law of fisheries (including sea-fisheries) is fully discussed elsewhere in this treatise, we will here only discuss, with any approach to detail, the laws relative to *game*.

[The Game Laws were, in early times, very stringent, and even as late as the reign of Charles II., none were permitted to take or sell game unless duly *qualified* in respect of property,—the ordinary qualification, as imposed by the Qualification Act, 1671 (22 & 23 Car. 2, c. 25), having been the ownership of lands or tenements in possession, for an estate of inheritance of the yearly value of £100, or an ownership for life, or for ninety-nine years or upwards, of lands of the yearly value of £150. This qualification was originally imposed chiefly for the preservation of the different species of game.]

It was subsequently made necessary, however, for sportsmen to take out a yearly game *certificate*, attesting the payment by them of a certain amount of duty. The Game Act, 1831, repealed the Qualification Act of Charles II.'s reign, and provided in substance, that the exclusive right to kill game upon any land should be vested

(*m*) Wild Birds Protection Acts, 1880, 1881, 1894, 1896 and 1902.

(*n*) Sand Grouse Protection Act, 1888.

(*o*) Freshwater Fisheries Acts, 1878 and 1884.

(*p*) Shell Fish Regulation Act, 1894.

ratione soli in the owners of such land, who may of course let or grant the right to others. By the same Act (as amended by the Game Licenses Act, 1860) all persons killing, taking, or pursuing game are required to take out a yearly *excise licence*, which stands in the place of the former *game certificate ;* and persons who (having no such licence) *deal* in game, are required to take out an excise licence for this latter purpose. By the Gun Licenses Act, 1870, an excise licence of 10*s.* has been imposed on every person *using or carrying a gun*, being, *semble*, persons who have not at the time a valid licence to kill game. And we may here usefully observe, that the revenue from gun-licences, dog-licences, licences to kill game, and certificates to deal in game, has now been granted to the county councils by s. 20 of the Local Government Act, 1888.

There are also many penal provisions, intended for the better preservation of game (*q*), and for the protection of landowners against *poaching* (whether by night or otherwise), and generally against unlawful trespasses in pursuit of game (*r*).

In the Game Act, 1831, "game" is defined generally as including hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards (*s*) ; though the Game Licences Act, 1860, and the Poaching Prevention Act, 1862, are also directed to deer, woodcock, snipe, quail, landrail, and rabbits. As regards hares and rabbits, special provisions relative thereto are contained in the Hares Act, 1848, and the Game Licences Act, 1860, the short effect of which is, that, in the absence of special agreement to the contrary, any *occupier* of inclosed lands (or any owner thereof with the right of killing game thereon) may kill *hares* on such land without an excise licence ; and any one may pursue *hares* with greyhounds,

(*q*) Game Act, 1831 ; *Saunders* v. *Baldy* (1866), 1 Q. B. D. 87 ; *Guyer* v. *The Queen* (1889), 23 Q. B. D. 100.

(*r*) Game Act, 1831, ss. 30 *et seq.* ; Poaching Prevention Act, 1862.

(*s*) Section 13.

beagles, or other hounds without an excise licence, subject of course to any question of trespass; and no licence need be obtained by one who is merely assisting another in the pursuit of game which his employer is duly licensed to kill (*t*). Also, under the Ground Game Act, 1880, the right of the *occupier* (*u*) to kill hares and rabbits (*i.e.*, *ground game*), concurrently with the landowner or other person entitled under him to such game, is made a right inseparable from his occupation; and he cannot contract himself out of this concurrent right. But he may let his ordinary rights (not arising under the Act) to any third party (*x*). In consequence of the great decrease in the number of hares in this country arising from the almost indiscriminate slaughter thereof which appears to have resulted from the last-mentioned Act, a close season for these animals, extending from March to July, both months inclusive, has now been introduced, by the Hares Preservation Act, 1892.

The various provisions of the Game Acts, the general effect of which has been in part above stated, do not interfere in any way with the rights of forest, park, chase, or warren; and the following distinctions, with reference to the acquisition of title in birds and beasts of game, are therefore to be known and observed, that is to say:—First, if a man starts any such bird or beast on his own ground, and follows it into another's and kills it there, the property remains in himself (*y*); but if (being a trespasser) he starts it on another man's land, and kills it there, the property belongs to him in whose ground it is killed (*z*), and this, even though the trespasser may have sold the dead game to a third person (*a*). But, secondly,

(*t*) Game Licences Act, 1860, s. 5.

(*u*) *Allhusen* v. *Brooking* (1884), 26 Ch. D. 559.

(*x*) *Morgan* v. *Jackson*, [1895] 1 Q. B. 885.

(*y*) *Sutton* v. *Moody* (1697). Lord Raym. 251; 2 Salk. 556; 3 Salk. 290.

(*z*) *Ibid.*

(*a*) *Blades* v. *Higgs* (1866), 11 H. L. C. 621.

if a stranger starts game in one man's chase or free warren, and hunts it into another's liberty, the property continues in the owner of the chase or warren (*b*). These distinctions seem to show, that although in general property is acquired by occupancy, yet the title by occupancy cannot prevail against the better claim either of him in whose grounds the animal is both started and killed (and who therefore may be said to be entitled *ratione soli*); or of him in whom, as having a right of free warren, there is already a qualified property in the game, *ratione privilegii*. In conclusion upon this head, we may observe, that the person who is owner of the game will be liable in a civil action for damages, should he cause damage to a person to whom he has leased the land by overstocking it with game (*c*).

3. [A third species of title grounded on the right of occupancy, is the title by *accession*. According to the Roman law, if any corporeal object received an accession, whether by natural or by artificial means,—as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils,—the owner of the original corporeal object remained the owner of it in such its altered or improved condition (*d*). But if, by reason of such operation, the original object was changed into a different species,—as by making wine, oil, or bread out of another's grapes, olives, or wheat,—then in such a case the original object became the property of the operator, who was only required in that case to make a satisfaction to the original proprietor for the materials used (*e*). These doctrines of the Roman law were, as regards England, implicitly adopted, and (it is sometimes said) even copied, by Bracton (*f*); and they have since been confirmed by

(*b*) *Sutton* v. *Moody*, *ubi sup.*

(*c*) *Farrer* v. *Nelson* (1885), 15 Q. B. D. 258.

(*d*) Inst. 2, 1, 25, 26, 31; Dig. 6, 1, 5.

(*e*) Inst. 2, 1.

(*f*) L. 2, ch. 2.

[many decisions of the English courts (*g*). For, with respect to accession by breeding from animals, in particular, it has been held, that the brood of all tame and domestic animals belongs to the owner of the dam or mother, the English law thus agreeing with the civil, that *partus sequitur ventrem* in the brute creation, though for the most part, in the human species, it disallows that maxim. And therefore in the laws of England (*h*), as well as of Rome, "*si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est.*" An exception to this rule obtains, however, in the case of swans, for the young cygnets belong equally to the respective owners of the cock and hen birds (*i*); but here the reasons of the general rule cease, and *cessante ratione legis cessat et ipsa lex.* For the male is well known by his constant association with the female, and the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

4. A fourth species of title grounded on occupancy is the title by *confusion*, being a title which arises where the goods of two persons become so intermixed that the several portions can be no longer distinguished. And here the English law partly agrees with, and partly differs from the Roman. For if the intermixture be by consent, then, by both laws, the proprietors have an interest in common, in proportion to their respective shares (*k*). But if the intermixture be without consent, as where one man intermixes his corn or hay with that of another man, or casts gold into another's melting-pot or crucible, without the knowledge or approbation of the latter, the civil law,

(*g*) Year Books, 5 Hen. 7, 15; 12 Hen. 8, 10; Bro. Ab. *Propertie*, 23; Moore, 20; Popham, 38.

(*h*) Bro. Ab. *Propertie*, 29.

(*i*) *Case of Swans* (1592), 7 Rep. 17.

(*k*) Inst. 2, 1, 27, 28; *Buckley* v. *Gross* (1863), 3 B. & S. 566.

[though it gave the sole property of the whole to him who had not interfered with the mixture, yet allowed a satisfaction to the other for what he so improvidently lost. But our law gives, in such a case, the entire property, without account, to him whose original dominion is invaded without his own consent (*l*).] However, this rule of the English law applies only to cases where the confusion is such as to render it impossible subsequently to apportion the respective shares; for if the goods continue to be distinguishable, as in the instance of articles of furniture thrown together, the confusion makes no alteration in the property (*m*). Or if the quality of the articles is uniform, and the original quantities are known, as in the case of £500 of trust money mixed with £300 of the trustee's own money, the party by whose act the confusion took place would still be entitled to claim his proper quantity, subject only to the quantity of the other proprietor being first made good out of the whole mass (*n*).

(*l*) *Ward* v. *Ayre* (1615), Cro. Jac. 366; 2 Bulst. 323; 1 Hale, P. C. 513; *Colwill* v. *Reeves* (1810), 2 Camp. 576.

(*m*) *Colwill* v. *Reeves*, *ubi sup.*

(*n*) *Lupton* v. *White* (1809), 15 Ves. 442; *In re Hallett's Estate*, *Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696; *Mutton* v. *Peat*, [1899] 2 Ch. 556; [1900] 2 Ch. 79.

CHAPTER III.

OF TITLE BY INVENTION.

We come now to the title by *Invention*, which includes Patent Rights, Copyrights, and rights to Trade Marks and Designs, all of which four classes or species of rights may with propriety be considered together, within the compass of the same chapter.

I.—Patent Rights.

What is a Patent Right.—By a "Patent Right" is meant a privilege granted by the Crown to the first inventor of any manner of new manufacture, enabling the grantee to prevent all other persons from making, using, exercising, or vending during a limited period, the subject matter of the invention. The right is so called, because the instrument by which it is bestowed has always been in the form of *letters-patent*. To confer, indeed, on any individual the exclusive right of carrying on a particular trade or manufacture is, in general, beyond the lawful bounds of the royal prerogative; for such a grant amounted, at the common law, to a monopoly (*a*), and by the Statute of Monopolies (21 Jac. I. c. 3), was declared to be "altogether contrary to the laws of this realm." But an exception was made in favour of inventors of *new* manufactures, because with regard to them, grants of exclusive privileges for a reasonable period, while they tended to encourage useful ingenuity, encroached on no right of which others were already in possession (*b*). In accordance, therefore, with this exception of the common

(*a*) 3 Inst. 181.

(*b*) 3 Inst. 184; *Darcy* v. *Allin* (1602), 11 Rep. 84.

law, the Statute of Monopolies excepts, from its general operation, all letters-patent for the term of *fourteen years* or under, by which the privilege of sole working or making any manner of new manufactures within this realm, which others at the time of granting the letters-patent shall not use, shall be granted to the true and first inventor thereof, "so as they be not contrary to law, nor "mischievous to the state, nor to the hurt of trade, nor "generally inconvenient."

Since that statute, no patent right has been valid unless it falls within the terms of the exception above referred to (*c*); and accordingly no patent right can be legally granted (at least in the first instance) for any period longer than fourteen years, and the subject of the patent must be "a manner of *new* manufacture within this realm." And, *first*, it must be a *manufacture*, which, broadly stated, means some fabricated article, or the means of making such an article. A patent may be taken out not only for an entire article, but also for an addition, by way of improvement, to one already existing, or for a new application of an old thing (*d*), or even for a chemical or other process of production (*e*). *Secondly*, the manufacture must also be *new*. A patent, therefore, granted for an article already used, or known, or communicated to the public in this country, whether the prior use or discovery be known to the patentee or not, would be void (*f*). It is sufficient that it be new *within this realm* at the time the patent is granted, the previous notoriety of the article, in a foreign country, being no objection to the validity of the patent (*g*). A thing or process is not "new," in the sense referred to, if it has

(*c*) *Boulton* v. *Bull* (1795), 2 H. Bl. 486.

(*d*) *Crane* v. *Price* (1842), 4 Man. & G. 580; *Gadd* v. *Manchester* (1892), 9 R. P. C. 516.

(*e*) *Badische Anilin* v. *Levinstein* (1887), 12 App. Ca. 710.

(*f*) 3 Inst. 184; *Hill* v. *Evans* (1818), 8 Taunt. 401; *Patterson* v. *Gaslight and Coke Company* (1875), 3 App. Ca. 239.

(*g*) *Rolls* v. *Isaacs* (1881), 19 Ch. D. 268.

been already published in this country by means of prior user, or in books or documents, or disclosed to particular individuals not bound to secrecy. But by the Patents, etc. Acts of 1883 and 1886, the mere exhibition of an invention at a public show, which used to amount to a prior publication of it, will not have any such effect, provided the intending patentee give previous notice to the Patent Office of his intention to exhibit it, and within six months thereafter make due application for his patent. *Thirdly*, it is now established that a patentable thing or process must involve some invention or ingenuity, and must possess the characteristic of *utility*, *i.e.*, for the purpose indicated by the patentee (*h*). *Fourthly*, the applicant, or one of the applicants, for the patent must be the "*true and first inventor.*" The word *inventor* implies some exertion of ingenuity, and supposes some difficulty surmounted ; so that when the new manufacture is of an obvious character, requiring no skill or contrivance for its production, it is not the fit subject-matter of a patent. And as to being the *true* and *first* inventor, no one can claim this character, if it appear that the novelty in question was first suggested to him by some other person in this country (*i*) ; but where the secret is acquired abroad by one who afterwards introduces it into this realm, he is considered (for the purpose now under consideration) as the true and first inventor. For it is immaterial whether the benefit bestowed on the public be the result of a man's travel and observation, or the fruit of his original genius (*k*). In the case of two simultaneous discoverers, he who first procures a patent, before the matter is made public, is entitled to enjoy the exclusive privilege it confers.

(*h*) *Dowling* v. *Billington* (1890), 7 R. P. C. 191 ; *Lane-Fox* v. *Kensington Co.*, [1892] 3 Ch. 424 ; *Welsbach Co.* v. *New Incandescent, etc. Co.*, [1900] 1 Ch. 843.

(*i*) *Marsden* v. *Saville Street Co.* (1878), 3 Ex. D. 203.

(*k*) *Harris* v. *Rothwell* (1887), 35 Ch. D. 416.

Procedure for obtaining letters-patent.—The grant of a patent right is not *ex debito justitiæ*, but is an act of royal favour; though in a fit case it is never refused. The mode of proceeding to obtain it is now regulated by the Patents, Designs, and Trade Marks Act, 1883, as amended by the Patents, Designs, and Trade Marks Acts, 1885, 1886, and 1888, and the Patents Act, 1902. The general mode of proceeding under these statutes is as follows:—The applicant may be a British subject or a foreigner, and one or more persons may be joint applicants (*l*); and the application is made by petition contained in, and supported by, a solemn declaration that the petitioner is the true and first inventor, and that the invention is not in use in this country by any other person, to the best of his knowledge and belief. The application, which must be left at, or sent to, the Patent Office (*m*), must be accompanied by either a provisional or a complete specification (*n*)—the provisional specification describing generally the nature of the invention, and being usually accompanied by drawings illustrative thereof; and the complete specification particularly describing and ascertaining in detail the nature of the invention, and in what manner it is to be performed or put in use, and being usually accompanied by drawings illustrative thereof, or else referring to the drawings thereof which accompanied the provisional specification (*o*). The complete specification, if not left with the application, must be sent not later than nine months (or, by leave, ten months) from the date of the application, otherwise the application is taken to have been abandoned (*p*). The application is referred, by the comptroller of patents, to an examiner; and the examiner reports thereon (*q*)—first, whether the invention is fairly described; secondly, whether the appli-

(*l*) Patents Act, 1883, s. 4; Patents Act, 1885, s. 5.

(*m*) Patents Act, 1883, s. 5, sub-s. (1).

(*n*) *Ibid.* s. 5, sub-s. (2).

(*o*) Patents Act, 1886, s. 2.

(*p*) *Ibid.* s. 8; Patents Act, 1885, s. 3.

(*q*) Patents Act, 1883, s. 6.

cation, with the accompanying specification, is in proper form; thirdly, whether the title sufficiently indicates the subject-matter of the invention; and (so soon as the complete specification is left) fourthly, whether the invention described in that specification agrees with that in the provisional one; and fifthly, whether the invention claimed has been wholly or in part described in any previous specification during the preceding fifty years (*qq*). If the report on these three or (as the case may be) five heads is in the affirmative, then the patent is said to be "accepted"; and thereupon the comptroller gives notice of its acceptance to the applicant. After such acceptance, the inventor enjoys, during the interval between the date of the application and the date of sealing the patent, the right to use his process without prejudice to the patent thereafter to be granted, this immunity of enjoyment being known as his "provisional protection" (*r*). And in case a complete specification has been left with the original application, or so soon as being thereafter left it has been "accepted," then in addition the applicant has, during the interval between the acceptance of the complete specification and the date of sealing the patent, the like rights as if the patent had been already granted, except that he has no right of action for an infringement, unless and until the patent is in fact granted (*s*).

So soon as the complete specification has been accepted, the comptroller advertises its acceptance (*t*) and after such advertisement, the specification is open to inspection at the Patent Office. Within two months after the advertisement, any person may give notice at the Patent Office of opposition to the grant of the patent (*u*), on any or either of the following grounds: namely, (1) that the applicant has obtained the invention from him, or from a person of whom he is the legal representative; (2) that

(*qq*) Patents Act, 1902, s. 1.
(*r*) Patents Act, 1883, s. 14.
(*s*) *Ibid.* s. 15; *Ex parte Bates and Redgate* (1869), L. R. 4 Ch. App. 578; *Ex parte Henry* (1873), L. R. 8 Ch. App. 167.
(*t*) Patents Act, 1883, s. 10.
(*u*) *Ibid.* s. 11.

the invention has been patented in this country on an application of prior date; (3) that the complete specification comprises an invention other than that described in the provisional specification, and that the former invention forms the subject of a pending application made by the opponent. If notice of opposition be given at the Patent Office, the comptroller gives notice thereof to the applicant; and after the expiration of the two months, and after hearing the applicant and his opponent or opponents, the comptroller decides on the case, with an appeal to the Law Officer. On such appeal, the Law Officer hears the parties, and (with or without the assistance of an expert) determines whether the patent shall be granted or not (*x*). If, however, there is no opposition to the grant, or if the opposition thereto is decided in favour of the applicant and against his opponent or opponents, then the comptroller causes a patent to be sealed with the seal of the Patent Office (*y*)—a simplification of the former practice, under which a warrant for the purpose was first passed by the Commissioners of Patents, and the Lord Chancellor thereupon caused letters-patent for the invention to be sealed with the Great Seal of the United Kingdom. The grant is then recorded in the register of patents at the Patent Office.

The object of the complete specification is, of course, to put the public in full possession of the inventor's secret; so that any person may be in a condition to avail himself of it, when the period of exclusive privilege has expired. To prevent this object from being defeated by an evasive or careless description, the specification is construed with great strictness by the courts. And in describing the nature of the invention, the specification whether provisional or complete, must commence with the title of the patent; and, in the case of a complete specification, must end with a distinct statement of the invention claimed (*z*).

(*x*) Patents Act, 1883, s. 11.
(*y*) *Ibid.* s. 12.
(*z*) *Ibid.* s. 5, sub-s. (5); *Siddell* v. *Vickers* (1890), 15 App. Cas. 496.

The office of the complete specification being to set forth, with more particularity, the subject indicated in the provisional specification or in the patent itself, if one thing be claimed by the patent and another by the specification, the grant is void (*a*). It is also an objection to the specification, if it covers too much, that is, includes, in its claim of new invention, anything which in fact has been already known and practised. And therefore if the entire article for which the patent is being taken out comprises some matter of this description, in connection with others that are new, the claim ought to be made in such form as to apply to the latter only; or if the combination of several known things happens to be the only novelty, it is to the *combination* only that the claim should be directed (*b*). And as regards the description of the manner of production, the general rule is, that the specification should enable persons of ordinary skill to make the patent article, by simply following the directions given, without resorting to contrivances of their own (*c*). In framing the specification, no circumstance may be safely passed over which is advantageous, whether absolutely essential or not, in the conduct of the process; and if several methods are stated, the specification will be defective and the patent void, if *any* of them be found to fail in effecting the promised result (*d*).

By the letters-patent (which are in general not to be granted after the expiration of fifteen months from the date of the application) there is granted to the applicant the exclusive right of making, using, exercising, and vending (*e*) his invention within the United Kingdom and the Isle of Man, for the full term of fourteen years, subject to the patentee making the prescribed payments (*f*).

(*a*) *Nuttall* v. *Hargreaves*, [1892] 1 Ch. 23.

(*b*) *Pneumatic Tyre Co.* v. *Casswell* (1897), 13 R. P. C. 164.

(*c*) *Miller* v. *Searle & Co.* (1893), 10 R. P. C. 106.

(*d*) *Siddell* v. *Vickers*, *ubi sup.*

(*e*) Patents Act, 1883, s. 12; Patents Act, 1885, s. 3.

(*f*) See *Saccharin Corporation* v. *Reitmeyer*, [1900] 2 Ch. 659.

And such patent right holds good against the Crown (*g*), at least *quodam modo* ; that is to say, the Crown may still use the patent, but paying therefor what shall be agreed, or (failing agreement) what the Treasury shall appoint (*h*).

Assignment of patents and licences.—A patent right is *assignable* either absolutely or by way of mortgage (*i*) ; and the assignment may be of part even of the patent, or may be for some specific place or country only (*k*). But in every case, the assignment, to pass the legal interest, must be in writing under hand and seal, though an equitable assignment is effectual without a deed (*l*). It is also competent to the patentee, without an entire alienation of his interests, to grant *licences* to any one or more persons to manufacture, use, or sell the subject-matter of the patent ; and for the due working of the invention, he may (by an order of the Judicial Committee of the Privy Council made on a reference to it by the Board of Trade of a petition presented by "any person interested") even be *compelled* to grant such licences (*m*). Every assignment, and also every licence, must be registered at the Patent Office in the register of patents (*n*). For the better conduct of patent business, and with a view also to the public benefit, and to the due publication of the invention, a Patent Journal, reports of patent cases, and indexes of specifications, etc., have been provided at the Patent Office (*o*) ; and patent agents must now be registered, if they would describe themselves as such (*p*).

Extension of letters-patent.—Formerly in favour of a patentee who had not reaped the full benefit of his invention, the legislature frequently interfered, by passing a private Act of Parliament, to secure him the continuance

(*g*) Patents Act, 1883, ss. 27, 44 ; *Feather* v. *The Queen* (1865), 6 B. & S. 257.

(*h*) *Nobel's Explosives* v. *Anderson* (1890), 12 R. P. C. 164.

(*i*) *Steers* v. *Rogers*, [1893] A. C. 232.

(*k*) Patents Act, 1883, s. 36.

(*l*) *Re Casey's Patents*, [1892] 1 Ch. 104.

(*m*) Patents Act, 1902, s. 3.

(*n*) *Ibid.* s. 23.

(*o*) *Ibid.* s. 40.

(*p*) Patents Act, 1888, s. 1.

of the privilege for a further term of years, in addition to that first limited by the letters-patent. A less costly mode of relief in such cases is now in use; for the grantee may, under such circumstances, apply *by petition* to the Crown for a prolongation of the existing term, his intention to do so being first duly advertised (*q*), and the petition being actually presented six calendar months, at least, before the expiration of the original term. If, upon consideration of the nature and merits of the invention in relation to the public, of the profits made by the patentee as such, and of the whole matter, and after hearing any party who may choose to enter a "caveat," the Judicial Committee of the Privy Council reports in favour of the application (*r*), the Crown is empowered either to grant to such patentee, or to his assignee, or to both conjointly, as the case may be, an extension of the term of the patent for a period not exceeding seven years, or (in exceptional cases) fourteen years, to commence after the expiration of the first patent (*s*); or to order the grant of a new patent for the term therein mentioned, and containing any restrictions, conditions, and provisions that the Judicial Committee may think fit. But, of course, the petition may also be refused altogether (*t*).

Remedies for infringement.—If a patent right be infringed, the inventor has his remedy by action to recover damages for the injuries sustained (*u*). In such action he must deliver (with his statement of claim) a document called "particulars of the breaches." He may also in such action obtain an injunction restraining the wrongdoer from the further use of the invention, and compelling him to account for the profits which he may have already

(*q*) Patents Act, 1883, s. 25; *Re Henderson's Patent*, [1901] A. C. 616.

(*r*) *Ibid.* s. 25, sub-s. (5); *Lockwood's Case*, [1894] A. C. 347.

(*s*) *Ibid.*; *Re Hopkinson's Patent*, [1897] A. C. 249.

(*t*) *Parson's Patent*, [1898] A. C. 673; *Re Henderson's Patent*, [1901] A. C. 616; *Re Peach's Patent*, [1902] A. C. 414.

(*u*) Patents Act, 1883, s. 29; *De Vitre* v. *Betts* (1873), L. R. 6 H. L. 319; *British Motor Syndicate* v. *Taylor*, [1901] 1 Ch. 122.

derived therefrom (*x*); but the penalty of £50 in addition, which was provided by the 5 & 6 Will. IV. c. 83, s. 7, when any person, without licence, used the name, stamp, or mark of any patentee, has been abolished. The defendant in any such action may, of course, defend it, either on the ground that no infringement has taken place, or on the ground that the patent is invalid. In the latter event he must, with his statement of defence, deliver "particulars of his objections" to the patent (*y*); and the invalidity of the patent may be established by showing, that the article was not a fit subject for a patent, or else that the patentee was not the first inventor, or that the specification was insufficient.

Revocation of patents.—Nor is this the only method of defeating claims founded on an alleged patent right; for, whether there were any complaint of infringement or not, it used to be competent to the Crown (or to any subject of the realm in the name of the Crown, by leave of the Attorney-General) to institute a proceeding called a *scire facias* for the formal impeachment of the patent; and by the effect of this (if found open to any of the objections above enumerated, or to any other sufficient exception in point of law), the patent would have been cancelled (*z*). But this species of relief is now obtainable on petition to the court for revocation of the patent, the petition being presented either by the Attorney-General, or by any one authorised by him, or by any aggrieved person (*a*). The Act requires that the petitioner shall deliver to the inventor particulars of the objections to the patent upon which he intends to rely at the hearing of the petition.

(*x*) Patents Act, 1883, s. 30; *Proctor* v. *Bayley* (1889), 42 Ch. D. 390.

(*y*) *Ibid.* s. 29; *Crompton* v. *Anglo-American Brush Co.* (1887), 35 Ch. D. 283.

(*z*) *Smith* v. *Upton* (1844), 6 Man. & G. 251.

(*a*) Patents Act, 1883, s. 26; *In re Avery's Patent* (1887), 36 Ch. D. 307.

Miscellaneous points.—For the protection of patentees, the Acts of Parliament above mentioned have introduced some other provisions of great importance to which we will now briefly refer. *First*, they enable the applicant or patentee, by request in writing left at the Patent Office, to obtain leave to amend his specification, by way of disclaimer, correction, or explanation; and the amendment may be allowed with or without terms. No amendment is, however, allowable which would make the specification as amended claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before amendment (*b*). *Secondly*, if, in any action for infringement, the court has certified that the validity of the patent came in question, then, in any subsequent action for infringement, the plaintiff, on obtaining judgment in his favour, may have his full costs, charges, and expenses as between solicitor and client (*c*). *Thirdly*, if a patent is lost or destroyed, a duplicate thereof may be sealed (*d*). *Fourthly*, for the protection of the public, the Patents Acts have also provided, that a person claiming to be a patentee may not by circulars, advertisements, or otherwise, *without just and probable cause*, use threats of legal proceedings against persons manufacturing or dealing in articles alleged to be (but not really being) infringements of his patent; and an injunction may be obtained against the continuance of such threats, with or without damages (*e*).

II.—COPYRIGHT.

Definition and history.—By *Copyright* is meant the right of an author to print or otherwise multiply copies of his own original literary or artistic work, exclusively

(*b*) Patents Act, 1883, s. 18; *Moser* v. *Marsden* (1897), 13 R. P. C. 24; *Johnson's Patent* (1897), 13 R. P. C. 660.

(*c*) *Ibid.* s. 31; *Cole* v. *Saqui* (1889), 40 Ch. D. 132.

(*d*) *Ibid.* s. 37.

(*e*) *Ibid.* s. 32; *Halsey* v. *Brotherhood* (1881), 19 Ch. D. 386; *Skinner* v. *Shaw*, [1893] 1 Ch. 413.

of all other persons (*f*). It does not appear that the Roman Law recognised in any specific way this right of property; and with us in England the right was not definitely recognised until a comparatively late period of our legal history. But in the reign of Queen Anne, it became at length the subject of positive regulation, the statute 8 Anne, c. 21, having enacted that the author of any book, and his assigns, should have the sole liberty of printing and reprinting it, "for the term of fourteen years, and no longer"; and the right so recognised was protected by means of penalties and forfeitures inflicted on all those who infringed the copyright. And under the Act of Queen Anne, as amended by the Copyright Acts, 1775 and 1801, if, at the end of the fourteen years, the author himself should be living, the copyright returned to him for another term of the same duration.

The true nature and extent of copyright were not, however, finally settled by the statute of Queen Anne. For it was left in uncertainty, whether, at the common law, and independently of that statute, an author did or did not possess an exclusive privilege (without limitation in point of time) of publishing and republishing his own works; and whether supposing that he did, the statute had not permitted that privilege to remain without abridgment the limitation which it contained in point of time being thought by some to apply to the new statutory protection only, and not to the old common law right itself. These questions were not set at rest until the year 1774, when it was solemnly decided, that any exclusive privilege which may have belonged at the common law to authors in respect of their works was at any rate taken away by the legislative enactments above mentioned, and that these statutes thenceforth constituted the only basis on which a claim to copyright could rest (*g*).

(*f*) *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815.

(*g*) *Donaldson* v. *Beckett* (1774), 2 Bro. P. C. 145; 4 Burr. 2408; *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815; *Tuck* v. *Priester* (1887), 19 Q. B. D. 48, 629.

Afterwards, in the reign of George the Third, the period of literary proprietorship was extended by Acts, which conferred upon the author an exclusive right for twenty-eight years instead of fourteen, and, in the event of his surviving that term, then for the residue of his natural life.

General rights under Copyright Act, 1842.—The law of copyright, however, is now mainly regulated by the Copyright Act, 1842, which has repealed the earlier Acts, and has provided (in favour of authors) that the copyright of every *book* (under which word is included, in the construction of the Act, "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published in the United Kingdom") (*h*), which shall be published in the lifetime of its author, whether a subject of the Crown or not (*i*), shall endure for his natural life, and for seven years longer; or if the seven years shall expire before the end of forty-two years from the first publication, then for such period of forty-two years; and that when the work is posthumous, the copyright shall endure for forty-two years from the first publication, and shall belong to the proprietor of the author's manuscript.

Copyright is personal property (*k*); and as regards articles which are first published in periodical works, the copyright (unless there is some agreement to the contrary) remains vested in the author (*l*).

The Copyright Act, 1842, gives to the proprietor of a copyright infringed, by the book being unlawfully printed within the British Dominions, a remedy by action, to be commenced within twelve calendar months; and such action is to recover damages for the injury already suffered,

(*h*) Section 2.

(*i*) *Routledge* v. *Low* (1868), L. R. 3 H. L. C. 100.

(*k*) Copyright Act, 1842, s. 25.

(*l*) *Sweet* v. *Benning* (1855), 16 C. B. 459; *Walter* v. *Howe* (1881), 17 Ch. D. 708.

and an injunction to prevent the continuance of the infringement or piracy. As regards books unlawfully reprinted in any place out of the British Dominions, and imported into the United Kingdom, they may be seized as forfeited, by any officer of the customs or excise, and the offenders are liable to penalties (*m*). The statute has also authorized, in every case of copyright, the registration by the proprietor of his title at Stationers' Hall (*n*) ; and it provides, that, without previous registration, no action or other proceeding shall be commenced, though an omission to register is not otherwise to affect the copyright itself. And a wrongful registration of copyright may be expunged (*o*).

In an action for infringement of registered copyright, if the defendant proposes to defend the action, he must give the plaintiff notice in writing of the particulars of any objections on which he means to rely at the trial ; and if his defence be, that the plaintiff was not the author or first publisher, or is not the proprietor, or that some other person was or is so, then the defendant must include such particulars in his notice of objections, or otherwise he may give no evidence at the trial that the plaintiff was not the author or first publisher, or was or is not the proprietor (*p*). And here we may observe, that it is no violation of the copyright in a novel to dramatise it for the stage (*q*) ; also, that some amount of copying by one author from another is permissible, the question being in all cases one of degree, depending on whether the copying amounts to a substantial taking by the one author of the labours of the other (*r*). An action for infringement will

(*m*) See *Boosey* v. *Whight*, [1900] 1 Ch. 122 ; *Hildesheimer* v. *Faulkner*, [1901] 2 Ch. 552.

(*n*) Section 11 ; *Mathieson* v. *Harrod* (1869), L. R. 7 Eq. 270.

(*o*) Section 14 ; *Ex parte Davidson* (1853), 2 El. & Bl. 577.

(*p*) Section 16.

(*q*) *Reade* v. *Conquest* (1861), 9 C. B. (N.S.) 755 ; but see *Warne* v. *Seebohm* (1888), 39 Ch. D. 73.

(*r*) *Sweet* v. *Benning* (1855), 16 C. B. 459 ; *Dicks* v. *Yates* (1881), 18 Ch. D. 76, 90 ; *Maple & Co.* v. *Junior Army and Navy Stores* (1882), 21 Ch. D. 369.

lie to restrain even a gratuitous distribution of written copies of the work (*s*).

Assignment of right.—An assignment of copyright may be by writing under the hand, without being also under the *seal*, of the proprietor, it being enacted by the Copyright Act, 1842, s. 13, that an assignment, properly entered in the book of registry at Stationers' Hall, shall be as effectual as if made by deed, and shall be exempt from the payment of any stamp or other duty (*t*). Doubtless an author may (as in the case of patent rights) license (that is to say, authorize) any reproduction of his works; and the Copyright Act, 1842, provides for a sort of compulsory licence, having enacted, that it shall be lawful for the Judicial Committee of the Privy Council, on complaint made to them that the proprietor of a copyright, (after the death of the author,) has refused to republish or allow the republication of any book, *by reason whereof the work is withheld from the public*, to grant a licence authorizing the complainant to publish, on such conditions as such committee may think fit.

Works not capable of copyright.—No copyright can be claimed in any production which is immoral, blasphemous, or seditious in its tendency, or which is defamatory of private character (*u*), or which (with a view to defraud the public) is published as the work of one who is not in truth the author (*x*). Copyright may exist in the mere title of a book (*y*), at least, a quasi-copyright by time and use, but not by mere registration, may exist therein (*z*); also, in

(*s*) *Novello* v. *Sudlow* (1852), 12 C. B. 177.

(*t*) *Cumberland* v. *Planché* (1832), 1 A. & E. 580.

(*u*) *Lawrence* v. *Smith* (1822), Jac. 472; *Walcot* v. *Walker* (1802), 7 Ves. 1.

(*x*) *Wright* v. *Tallis* (1845), 1 C. B. 893.

(*y*) *Weldon* v. *Dicks* (1879), 10 Ch. D. 247; *Dicks* v. *Yates* (1881), 18 Ch. D. 76.

(*z*) *Licensed Victuallers' Newspaper Co.* v. *Bingham* (1888), 38 Ch. D. 139; *Schove* v. *Schmincke* (1886), 33 Ch. D. 546.

the mere external appearance of a newspaper, *e.g.*, *The Times* (*a*). But not in publications utterly devoid of literary value (*b*).

Special Crown and other rights.—Such being the general law of copyright, it will be proper to notice, in this place, that the Crown has the exclusive right of promulgating to the people all acts of state and government (*c*); and as the supreme head of the Church, the Crown has the same prerogative with respect to the liturgies, the books of divine service, and the authorized translation of the Bible, though, as regards the Bible (and also certain law books), the right has been considered as depending upon the circumstance of the same having been first made at the Crown's expense (*d*). These privileges are held, moreover, to extend to the Crown's grantees; in which capacity the Universities of Oxford and Cambridge, within their respective jurisdictions, and the King's Printer, claim the right of printing the Bible and Book of Common Prayer, and Acts of Parliament and other acts of state, to the exclusion of all other presses (*e*). And the Universities of Oxford and Cambridge enjoy also, by the Copyright Act, 1775, the sole liberty of printing *for ever*, at their own presses, all books of which the copyright has been bequeathed or otherwise given to them, or their respective colleges, in perpetuity. A similar right belongs to the colleges of Eton, Westminster, and Winchester; and it may be noticed, that the above Universities (and also certain public libraries) are entitled, on demand, to the delivery of a copy of every work which shall be published, while a copy must be delivered to the British Museum without demand (*f*).

(*a*) *Walter* v. *Howe* (1881), 17 Ch. D. 708.

(*b*) *Chilton's Case*, [1895] 2 Ch. 29.

(*c*) 2 Bl. Com. 410.

(*d*) 2 Bl. Com. 410; 4 Burr. 2329.

(*e*) *Basket* v. *Cambridge University* (1758), 2 Burr. 661.

(*f*) Copyright Act, 1842, ss. 7—9.

Copyright in lectures.—It was at one time a question, whether the law of copyright extended to the case of an *oral lecture*; or whether, on the other hand, it was lawful for the hearer to commit the instruction he received to his note-book, or memory, and to publish it afterwards as his own, and for his own benefit.

The importance of this question was in some measure superseded by the provisions of the Lectures Copyright Act, 1835, under which the sole liberty for twenty-eight years of printing and publishing any lecture, of the intended delivery of which notice in writing had been given to two justices, living within five miles of the place of delivery, two days before it was delivered, was secured to the lecturer. But the Act did not provide for the case of lectures delivered in a university or college, or in a public school, or to lectures delivered by any individual in virtue of any gift, endowment, or foundation. As regards these and other cases not within the scope of the Act, the question, therefore, is, whether such lectures have or have not been published. If published and printed they would be the subject of copyright. If published but not printed, they would not be protected; but if delivered to such a limited audience, or under such other circumstances, as to involve an express or implied condition against the lectures being used for general publication, the author would have a common law right to be protected against their unauthorized publication (*g*). The peculiar case of copyright in reports of public speeches was considered by the House of Lords in the recent case of *Walter* v. *Lane*, [1900] A. C. 539, where it was held that, if the speaker claims no rights, the reporter has a copyright in his own report.

Dramatic and musical copyright.—Other kinds of literary composition, not being *books* as defined by the

(*g*) *Caird* v. *Sime* (1887), 12 A. C. 326; *Nicols* v. *Pitman* (1884), 26 Ch. D. 374.

Copyright Act, 1842, are now also protected from piracy; and, in particular, with regard to *dramatic* (*h*) and musical *compositions* (*i*), it has been provided, by the Dramatic Copyright Act, 1833, and the Copyright Act, 1842, ss. 20, 21, as amended by the Copyright (Musical Compositions) Act, 1882, and by the Copyright (Musical Compositions) Act, 1888, that the author of such productions shall have, as his own property, the sole right of representation and performance of such compositions. On every copy published of a musical composition the right of public representation or performance must be expressed to be reserved (*k*), any inadvertent infringement of the copyright in a *song* being, however, now dealt with (both as regards costs and otherwise) wholly as the court may in its discretion direct (*l*). By a very recent statute (the Musical (Summary Proceedings) Copyright Act, 1902), a summary remedy is provided against the infringement of musical copyright, in the case of the sale of pirated copies of a work by street hawkers.

Artistic copyright.—The law recognises also a species of copyright in some other productions of genius, *e.g.*, under the Engraving Copyright Acts, 1734 and 1766, and the Prints Copyright Act, 1777 (*m*), in respect of *engravings and prints*; under the Sculpture Copyright Act, 1814, in respect of *sculptures, models, copies, and casts*; under the Patents, Designs, and Trade Marks Act, 1883 (*n*), in respect of *designs for articles whether of ornament or of utility*; and under the Fine Arts Copyright Act, 1862, in respect of *paintings, drawings, and photographs* (*o*),—the requisites prescribed by the several

(*h*) *Chatterton* v. *Cave* (1878), 3 A. C. 483.

(*i*) *Wall* v. *Taylor* (1883), 11 Q. B. D. 102; *Eaton* v. *Lake* (1888), 20 Q. B. D. 378; *Chappell* v. *Boosey* (1882), 21 Ch. D. 232.

(*k*) *Fuller* v. *Blackpool Co.*, [1895] 2 Q. B. 429.

(*l*) The Act of 1888, ss. 1—3.

(*m*) *Gambart* v. *Sumner* (1859), 5 H. & N. 5; *Lucas* v. *Cooke* (1880), 13 Ch. D. 872.

(*n*) *In re Clarke's Design*, [1896] 2 Ch. 38.

(*o*) *Pollard* v. *Photographic Co.* (1889), 40 Ch. D. 345; *Petty* v. *Taylor*, [1897] 1 Ch. 465; *Tuck* v. *Priester* (1887), 19 Q. B. D. 636.

Acts for ensuring the privileges respectively thereby conferred being, of course, first duly complied with.

Colonial and International Copyright.—By the Colonial Copyright Act, 1847, works entitled to copyright in the United Kingdom are declared entitled also to copyright in the colonies, and are protected against infringements accordingly; and by the International Copyright Act, 1886, s. 8, colonials have, on their part, the like copyright privileges for their original productions which foreigners have under the international copyright Acts next mentioned.

By the International Copyright Acts, 1844 to 1886, it is provided that the Crown, by order in council, may (1) as regards such *books, prints, articles of sculpture, paintings, drawings, photographs, and other works of art* as shall be, after a future time to be specified in the order, first published in any foreign country to be named in the order, allow the respective authors, inventors, artists, designers, engravers, or makers (and their personal representatives) the privileges of copyright therein for any period not exceeding the term for which the like productions would be protected if first published in the United Kingdom; (2) as regards such *dramatic pieces and musical compositions* as shall be, after a future time specified in such order, first publicly represented or performed in any foreign country named in such order, allow the authors to have the sole liberty of representing and performing them within the British dominions during any period, not exceeding the time during which they would be entitled by law to such sole liberty, if the first representation or performance had been in the United Kingdom; and (3) as regards *translations* of books first published, or of dramatic pieces first publicly represented in any foreign country, direct that the authors of such books or dramatic pieces shall be empowered to prevent the publication, in the British dominions, of any *translations of such books*, or the representation of any *translations of such dramatic pieces* not authorised by them, for such

time as shall be specified in the order (*p*). The Acts, however, provide that no such order in council is to have effect, unless, on the face of it, it be grounded on a due reciprocal protection secured by the foreign power therein named, for the benefit of parties interested in works first published in the dominions of his Majesty; nor unless, within a limited time, the work sought to be protected be duly registered, and a copy thereof (if it be a book, a print, or a printed dramatic piece, or musical composition) deposited at Stationers' Hall; nor (in the case of translations) unless the original work be registered, and a copy deposited in the United Kingdom, in the manner required for original works as above mentioned; nor unless the author notifies on the title page his intention to reserve the right of translation; nor unless a translation, sanctioned by the author, be published within ten years at the most; nor unless such translation be registered, and a copy thereof deposited, as in the case of original works.

III.—Trade Marks and Trade Names.

Definitions and history.—A trade mark may be shortly defined as some symbol applied or attached to goods sold by a particular trader in order to identify them as his goods, and to distinguish them from similar goods sold by other traders (*q*). Previously to the Trade Marks Registration Acts, 1875 to 1877, there was no property in any trade mark or trade name which the law recognised; but there was a sort of qualified right therein recognised by the law, sufficient to prevent any fraudulent use thereof *in connection with the same classes of goods* as those to which it had been appropriated by the original inventor

(*p*) See *Pitt Pitts* v. *George*, [1896] 2 Ch. 866; *Hanfstaengel* v. *American Tobacco Co.*, [1895] 1 Q. B. 347.

(*q*) Compare *Richards* v. *Butcher*, [1891] 2 Ch., pp. 532, 543.

thereof (*r*). The ground of the court's interference to prevent such fraudulent use was to save the public from a fraud, though incidentally the court saved the inventor from a loss; and this principle still exists independently of statute (*s*). But under the Trade Marks Registration Acts, 1875 to 1877, a trade mark might be registered, and upon such registration, the right to the mark became the property of the inventor; and although the last-mentioned Acts have been repealed, their provisions are re-enacted, with amendments, in the Patents, Designs, and Trade Marks Acts, 1883 to 1888. By these Acts it is provided that the registration of a person as proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of the trade mark, and shall, after the expiration of five years from the date of the registration, be *conclusive* evidence of his right to the exclusive use of the mark. But the trade mark is to be registered only for particular goods or classes of goods (*t*), and is only to be enjoyed in connection with such goods or classes of goods (*u*); and it is assignable and transmissible only in connection with the goodwill of the business concerned with such goods, and determines with that goodwill (*x*).

A register of trade marks is established by the Acts, and is kept at the Patent Office (*y*); and for Sheffield ware, there is a corresponding register situate at Sheffield, the Cutlers' Company being the comptroller there.

Essentials of a valid trade mark.—In order to be registered under the Acts, the trade mark must consist of or contain one at least of the following essential

(*r*) *Singer Manufacturing Co.* v. *Loog (1880)*, L. R. 8 App. Ca. 15; *Parsons* v. *Gillespie*, [1898] A. C. 239.

(*s*) *Powell* v. *Birmingham Co.*, [1896] 2 Ch. 54; *Reddaway* v. *Banham*, [1896] A. C. 199; *Payton* v. *Snelling*, [1901] A. C. 308.

(*t*) Act of 1883, ss. 65, 76; *Edwards* v. *Dennis* (1885), 30 Ch. D. 454.

(*u*) *Hart* v. *Colley* (1890), 44 Ch. D. 198; *Magnolia Metal Co.'s Mark*, [1897] 2 Ch. 371.

(*x*) Act of 1883, s. 70.

(*y*) *Ibid.* s. 78.

particulars (*z*), namely,—(1) the name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (2) a written signature (or copy thereof) of the individual or firm applying for registration thereof as a trade mark; or (3) a distinctive device, mark, brand, heading, label, or ticket; or (4) an invented word or invented words (*a*); or (5) a word or words (commonly called "*fancy words*") having no reference to the character or quality of the goods, and not being a geographical name (*b*). The Acts also allow to be added (if the applicant chooses) any letters, words, or figures, or combination thereof, provided that the application carefully expresses what are the essential particulars of the trade mark, and disclaims the exclusive use of such additional matter. "Old marks," *i.e.*, any distinctive letter, figure, or word, or combination of such, used as a trade mark before the 13th August, 1875 (*c*), including representations of the royal crown (*d*), may also be registered as trade marks under the Acts.

Remedies of registered owner.—The owner of a trade mark, being first duly registered, may now, without any proof of fraud, obtain an injunction and damages for the unauthorised use of his trade mark (*e*). By the Merchandise Marks Act, 1887 (*f*), the forgery of any registered trade mark, or its false application to goods like those in respect of which the mark has been registered, together with many other incidental acts of the like false and fradulent character, are made criminal offences, and punishable accordingly. On the other hand, the registration of a

(*z*) Act of 1883, s. 64; Act of 1888, s. 10.

(*a*) *Eastman Co.* v. *Comptroller* ("*Solio*"), [1898] A. C. 571.

(*b*) "*Bovril*" *Trade Mark*, [1896] 2 Ch. 600; *Magnolia Metal Co.'s Mark*, [1897] 2 Ch. 371; *Re* "*Uneeda*" *Mark*, [1901] 2 Ch. 550.

(*c*) Act of 1888, s. 10; *In re Trade Mark* "*Alpine*" (1885), 29 Ch. D. 877.

(*d*) *In re König*, [1896] 2 Ch. 236.

(*e*) *Upmann* v. *Forrester* (1883), 24 Ch. D. 231.

(*f*) *Kirshenboim* v. *Salmon*, [1898] 2 Q. B. 19.

trade mark, when it has been registered without sufficient cause, may be expunged on the application of anyone "aggrieved" (*g*).

Trade names.—The trade name of an individual or firm is not the subject of registration under the Acts; but anyone has a common law right to restrain another person from fraudulently employing the former's trade name or any colourable imitation of it, in such a way as to be calculated to deceive the public by confusing them as to the identity of the two persons and the goods sold by them (*h*).

IV.—Designs.

History of the law.—In the year 1842, by the Copyright in Designs Act, 1842, which repealed all the previous Designs Acts, and has itself been amended by various subsequent Acts, the proprietor of every new and original design not previously published (whether such design was applicable to the *ornamentation* of any article of manufacture, or to its pattern, shape or configuration) was enabled to register his design; and thereafter he became entitled to the copyright therein as applied to the specified article, for the varying periods in the Act specified. But every such article thereafter published or exposed for sale was to be marked with the design, and with the letters "Rd." (*i.e.*, registered), together with a number or letter showing the date of the registration (*i*). The proprietor obtained on registration a certificate of his title, and such certificate was *primâ facie* evidence of such title. By the 6 & 7 Vict. c. 65, these provisions were extended to articles of manufacture having reference to some purpose of *utility*, provided the design was for the shape and configuration of such articles.

(*g*) Act of 1883, s. 90.

(*h*) *Cash* v. *Cash* (1901), 86 L. T. R. 211; *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (1900), 83 L. T. 259; *North Cheshire Brewery Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83.

(*i*) *Blank* v. *Footman, Pretty & Co.* (1888), 39 Ch. D. 678.

All these Designs Acts have now been repealed, and their provisions re-enacted, with amendments, by the Patents, Designs, and Trade Marks Act, 1883. Under that Act, as amended by the Patents, Designs, and Trade Marks Act, 1888, it is provided (in effect), that the proprietor of any registrable design may register it; and he need not distinguish what is new from what is old, nor describe his design with the same nicety and accuracy as is required in the specification of a patent (*k*). In order to be registered, the design must be for something *new* or original, and not already published in the United Kingdom (*l*); but the novelty may consist in the mere combination (*m*). And the novelty is not now lost by exhibiting the design at any public show, provided the precautions in that behalf appointed by the Act (being the same precautions as those we referred to when speaking of the like exhibition of a patent invention) (*n*), are observed (*o*).

Mode of registering.—The registration is affected on request made to the comptroller, accompanied with the prescribed number of drawings, photographs, or tracings, or of specimens of the design itself (*p*); and there is to be kept at the Patent Office a book called "the register of designs," in which the names of all registered proprietors are to be entered, and all assignments of their titles. And the register is *primâ facie* evidence of such title (*q*).

Effects of registration.—Upon registration, the proprietor becomes entitled to the copyright of his design for five years from the date of the registration (*r*); and during the existence of such copyright, it is provided, that it shall not

(*k*) *McCrea* v. *Holdsworth* (1871), L. R. 6 Ch. App. 420.

(*l*) Act of 1883, s. 47; *Harper* v. *Wright*, [1896] 1 Ch. 143; *Heath* v. *Rollason*, [1898] A. C. 499.

(*m*) *R.* v. *Firmin* (1858), 3 H. & N. 304; *Lazarus* v. *Charles* (1873), L. R. 16 Eq. 117.

(*n*) *Vide supra*, p. 23.

(*o*) Act of 1883, s. 39; Act of 1888, s. 3.

(*p*) Act of 1883, ss. 47, 48; Sched. II. Form E.

(*q*) *Ibid.* s. 50.

(*r*) *Ibid.* s. 55.

be lawful for any person (without the license or written consent of the registered proprietor) to apply such design, or any fraudulent or obvious imitation thereof, in the class or classes of goods in respect of which such design is registered, for purposes of sale, to any article of manufacture, or to any substance, artificial or natural, or partly artificial and partly natural; and further, that it shall not be lawful for any person to publish or expose for sale any article of manufacture (or any substance) to which such design, or any fraudulent or obvious imitation thereof, shall have been so applied, knowing that the same has been so applied, without the consent of the registered proprietor. Any person so offending is made liable to forfeit for every offence a sum not exceeding 100*l.*, the registered proprietor of the design being entitled to recover such sum, as a simple contract debt, by action in any court of competent jurisdiction (*s*). In lieu of such penalty, the registered proprietor may (if he elects to do so) bring an action for the recovery of any damages arising from the application of the design, or of any fraudulent or obvious imitation thereof, for the purpose of sale, to any article of manufacture (or substance), or from the publication, sale, or exposure for sale by any person of any article (or substance), to which the design, or any fraudulent or obvious imitation thereof, shall have been so applied, such person knowing that the proprietor had not given his consent to such application (*t*).

(*s*) Act of 1883, s. 58, as amended by Act of 1888, s. 7.

(*t*) Act of 1883, s. 59.

CHAPTER IV.

OF TITLE BY GIFT ; AND BY ASSIGNMENT.

THE property in things personal is transferable with absolute freedom ; and in the case of any absolute assignment which should be expressed to be subject to a prohibition against any further subsequent assignment of the property, the prohibition would be void, both as being repugnant to the gift itself, and as being against the policy of the law (*a*).

There are some cases, however, where the right of disposal is, *in respect of the incapacity of the owner*, suspended ; as to which it will be sufficient in this place to remark, that the law relating to the disability of infants, insane persons, and persons under duress, applies in general to personal as well as to real property (*b*). In cases where the old law, as existing previous to the Married Women's Property Acts, 1870 and 1882, still applies, a married woman, also, may still be under an incapacity to alienate things personal, as well as things real, except, of course, where the property belongs to her for her separate use. There are also some few cases where, *in respect of the nature of the interest itself*, its transfer is absolutely prohibited ; *e.g.*, the pay or half-pay of a military or naval officer, or the salary attached to any public office of trust, which are, on grounds of public policy, not assignable,—the object being to secure to such persons, even against their own improvidence, the posses-

(*a*) Co. Litt. 223 a ; *Brandon* v. *Robinson* (1812), 18 Ves. 429.

(*b*) *Vide supra*, bk. II., pt. I., ch. xv.

sion of the means which are essential to the due performance of the duties of their station (*c*), while they either are engaged in, or are liable to be recalled to, the exercise of such duties (*d*). So, also, and partly for the like reason, the assignment of alimony is illegal (*e*); and the assignment or sale of a public appointment is contrary to the policy of the law, and is prohibited in most cases by express enactments of the legislature (*f*).

And as regards property *in futuro*, *e.g.*, goods not yet manufactured, or goods and machinery not yet (but which may hereafter be) brought upon any specified premises, these used not to be assignable at law. But in equity the purported assignment of them was deemed *a contract to assign them*, which contract (when for value) was considered as being (in effect) performed, and so the assignment was deemed effectual in equity. And since the fusion of law and equity which was effected by the Judicature Act, 1873, such assignments of property *in futuro* appear to be effectual in all respects, except where conflicting with the Bills of Sale Acts as hereinafter mentioned (*g*). As regards choses in action, these also were, by the strict rule of the old common law, incapable of being assigned, but in equity they were assignable, subject to certain conditions, and are now, generally speaking, transferable legally under the Judicature Act, 1873. This subject is, however, more fully dealt with later on in this work (*h*).

A transfer *inter vivos* of personal property may be either (1) gratuitous, in which case it is usually called a

(*c*) *Apthorpe* v. *Apthorpe* (1887), 12 P. D. 192.

(*d*) *Lucas* v. *Harris* (1887), 18 Q. B. D. 127.

(*e*) *In re Robinson* (1884), 27 Ch. D. 160; *Linton* v. *Linton* (1880), 15 Q. B. D. 239.

(*f*) 5 & 6 Edw. 6, c. 16; 49 Geo. 3, c. 126; 6 Geo. 4, cc. 82, 83.

(*g*) Bac. *Max. Reg.* 14; *Holroyd* v. *Marshall* (1864), 10 H. L. C. 191; *Tailby* v. *Official Receiver* (1888), L. R. 13 App. Ca. 523.

(*h*) See *post*, ch. 5, s. 12.

gift; or (2) not gratuitous, but for value, in which latter case, it is *an assignment* properly so called.

1. A GIFT is open—particularly when made in favour of a stranger, and not a relative—to some degree of suspicion (*i*); and, as against the creditors of the donor at the time of the donation, the gift, if in fraud of creditors, is made void by the 13 Eliz. c. 5. By the 3 Hen. VII. c. 4, a gift, made in trust *to the use of the donor*, had already been made void; because otherwise persons might have been tempted to commit crimes by this method of escape from the forfeiture of their goods, and because the creditors of the donor might otherwise have been defrauded thereby of their rights (*k*). And even as against the donor himself, a gift, to be valid in law, must be accompanied either by the solemnity of a deed, or by delivery of possession, or it may be effectual in equity if a valid declaration of trust of the subject-matter is made in favour of the donee (*l*). But when the gift is once perfected, either by execution of the deed or by a complete delivery of the thing, or by a complete declaration of trust, it is not in the donor's power to retract it, though made without any consideration or recompense, unless, indeed, he was under some legal incapacity, (such as infancy), or was drawn in, circumvented, or imposed upon by false pretences, surprise, or other unlawful inducement, to make the gift.

There are also several cases in which, owing to the donee being in a fiduciary relationship to the donor, a gift is presumed to be fraudulent and ineffectual, *e.g.*, gifts by wards to guardians, clients to solicitors, or persons of any kind to their spiritual superiors or advisers (*m*).

(*i*) 2 Bl. Com. 144.

(*k*) This statute was repealed by the Statute Law Revision Act, 1863.

(*l*) *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 552; *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57; *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582.

(*m*) *Liles* v. *Terry*, [1895] 2 Q. B. 679; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145; *Barron* v. *Willis*, [1899] 2 Ch. 578. See *infra*, p. 88.

There is also a species of gift called a *donatio mortis causâ*, which, though made *inter vivos*, does not take effect till after the death of the donor. It arises when a person in his last sickness, and apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods to keep in case of his decease (*n*). Which gift, if the donor die, needs not the assent of his executor, yet is accompanied with this implied trust or condition, that if the donor lives, the property shall revert to himself, being given only in contemplation of death or *mortis causâ* (*o*); and, being in the nature of a legacy, this donation might always have been made by a husband to his wife, though an ordinary gift *inter vivos* could not formerly have taken place directly between them (*p*). But, to render a *donatio mortis causâ* in any case effectual, it must be accompanied by a delivery of the chattel, or of the instrument—such as a bond or note, and the like—by which it is secured (*q*); and the executor or administrator of the donor is, in such a case, bound to put the instrument in suit for the benefit of the donee (*r*). The gift will be revoked, even after a complete delivery, if the possession be resumed by the donor (*s*). On the other hand, an *antecedent* delivery to the donee,—although in the capacity of bailee for the donor,—would suffice, if the quality of the possession should have been sufficiently changed before the death (*t*).

2. An ASSIGNMENT of chattels personal may in general be made by parol, that is, either by mere writing, or simply by word of mouth (*u*); and (being for value) it

(*n*) *Tate* v. *Hilbert* (1793), 2 Ves. jun. 111.

(*o*) 2 Bl. Com. 514; *Hills* v *Hills* (1841), 8 M. & W. 401.

(*p*) *Miller* v. *Miller* (1735), 3 P. Wms. 358.

(*q*) *Re Dillon* (1890), 44 Ch. D. 76; *Re Mead* (1880), 15 Ch. D. 651; *Re Weston*, [1902] 1 Ch. 680; *Re Beaumont*, [1902] 1 Ch. 889.

(*r*) *Rolls* v. *Pearce* (1877), 5 Ch. D. 730.

(*s*) *Bunn* v. *Markham* (1816), 7 Taunt. 224.

(*t*) *Cain* v. *Moon*, [1896] 2 Q. B. 283.

(*u*) *Heath* v. *Hall* (1813), 4 Taunt. 326.

does not require the solemnity of a deed, nor even the delivery of possession (*x*). If made in writing, it may be either in the form of a mere note or memorandum, or by a regular deed of assignment, which latter is ordinarily denominated a *Bill of Sale*. In the case of goods sent from abroad by ship to a person resident in this country, or *vice versâ*, the transfer of the property therein is commonly authenticated, or (as the case may be) originally effected, by an instrument (not under seal) termed a *Bill of Lading*, which is in its form a receipt from the captain to the shipper (usually termed the *consignor*), undertaking on specified conditions to deliver the goods (on payment of freight) to some person whose name is therein expressed, or indorsed thereon by the consignor (*y*). The delivery of this instrument (equally with the actual delivery of the goods) will suffice to pass and transfer to the party so named (usually termed the *consignee*), or to his *indorsee for value*, the property in such goods ; and that so as even to put an end to the unpaid consignor's right to stop the goods *in transitu* (*z*). And by the Bills of Lading Act, 1855, the indorsee has transferred to him all rights of suit, and is subject to the same liabilities, in respect of the goods, as if the contract in the bill of lading had been made with himself (*a*).

But though generally, and by the common law, personal property may be transferred without the use of writing, there are certain cases in which the statute law has required writing ; for, as we shall see later on, a writing is by statute made essential to a contract for the sale of goods to the value of £10 and upwards. And for the transfer of ships, and for the assignment of a patent or of a copyright, writing is also required ;

(*x*) *Martindale* v. *Booth* (1820), 3 B. & Ad. 507.

(*y*) *Sanders* v. *Maclean* (1883), 11 Q. B. D. 327.

(*z*) *Lickbarrow* v. *Mason* (1788), 2 T. R. 63 ; *Gurney* v. *Behrend* (1854), 3 E. & B. 622 ; Sale of Goods Act, 1893, s. 47.

(*a*) *Sewell* v. *Burdick* (1885), L. R. 10 App. Ca. 74.

and a bill of exchange or a promissory note, when made payable to the *order* of a particular person, can, of course, be assigned by him only under a written indorsement of his name.

Again, though the property in a chattel personal will (on a sale) pass without *delivery of possession*, yet it is to be remembered, that, by the 13 Eliz. c. 5, a gift (and even an assignment) of chattels, made with the intent to defeat or delay creditors, is void as against such creditors, though good and effectual as against the grantor himself (*b*). One of the principal badges of fraud has always been deemed to be the retention of the goods by the original owner, *contrary to the purport of his assignment* (*c*), although, where the retention of the possession is consistent with the apparent object of the parties (*e.g.*, in the case of a mortgage), that *primâ facie* presumption would not arise (*d*).

By the old common law, where judgment was obtained in an action, and a writ of execution by *fieri facias* issued thereon against the goods of the judgment debtor, the property in the goods was, in all cases, bound from the time of issuing the writ (*e*); but by the Statute of Frauds (29 Car. II. c. 3), s. 16, it was provided, in favour of *bonâ fide purchasers* of the goods, purchasing from the debtor after judgment, that no such writ should *as against them* (but not as between the judgment creditor and the judgment debtor) bind the property in the goods, but from the time that the writ was delivered to be executed, —a provision which has been repealed, but at the same time re-enacted, by the Sale of Goods Act, 1893, s. 26. Under the proviso contained in the last-mentioned section,

(*b*) 3 Rep. 82.

(*c*) *Twyne's Case* (1585), 3 Rep. 81.

(*d*) *Martindale* v. *Booth* (1832), 3 B. & Ad. 498.

(*e*) 8 Rep. 171; 2 Bl. Com. 447; *Samuel* v. *Duke* (1839), 6 Dowl. P. C. 536.

—which is a mere re-enactment of the provision to the like effect contained in the Mercantile Law Amendment Act, 1856, s. 1,—no writ of execution against the goods of a judgment debtor is now to prejudice the title thereto acquired by any person, *bonâ fide* and for a valuable consideration, unless such person had, at the time he acquired his title, notice that a writ (by virtue of which the goods might be seized or attached) had been delivered to, and remained unexecuted in the hands of, the sheriff (*f*).

By the Bills of Sale Act, 1878, as amended by the Bills of Sale Act, 1882, a bill of sale of personal chattels will be void wholly or to a certain extent, so far as regards any personal chattels comprised in such bill of sale which are left in the defendant's possession or apparent possession, unless such bill of sale shall have been duly *registered* in the Central Office of the Supreme Court within *seven days* from its date; and unless such registration shall have been renewed once in every period of *five* years during the subsistence of the security, and the other provisions of the Acts duly complied with.

There is an important distinction to be noted between an *absolute* bill of sale and one given by way of security for money. The former is a document evidencing an out-and-out sale, under which the seller continues in *apparent possession* of the goods sold. Non-compliance with the requirements of the Act in this case only avoids the bill, as against the trustee in bankruptcy of the grantor or an execution creditor. The latter is in effect a mortgage of chattels, and non-compliance with the Acts avoids it entirely, even as between the grantor and grantee. The Bills of Sale Acts are of a highly elaborate nature, and their provisions have to be very strictly complied with in order that a bill of sale may be effectual. In particular,

(*f*) *Williams* v. *Smith* (1859), 4 H. & N. 559.

bills by way of security must be in the exact form prescribed by s. 9 of the Act of 1882 (*g*), and the parties, the subject-matter, and the true consideration must be precisely described. The grantee's right to seize the goods for default of payment of the debt is limited to five cases, specified by s. 7 of the Act. The subject of bills of sale is an important one and is treated of in greater detail in a subsequent chapter (*gg*).

In what has been hitherto said of transferring chattels, we have supposed the property to be vested in the person who assumes to transfer it. In general, this circumstance is essential to the validity of the transaction, in accordance with the maxim "*nemo dat quod non habet*" (*h*). There are exceptional cases, however, in which a man may confer property in chattels, of which he is not himself the owner, and of which he is not even authorised to make a disposition; for if current coin of the realm be paid over for valuable consideration to an innocent party, his title thereto will be complete, although it should have been wrongfully obtained by the party who made the payment (*i*). And the case is the same with respect to notes of the Bank of England; also with respect to the transfer in regular course, of bills of exchange, promissory notes, and other negotiable instruments (*k*); and also with respect to goods sold in open market (*market overt*), except in the case of stolen goods, when the thief has been prosecuted to conviction (*l*). As regards choses in action which are not negotiable instruments, *e.g.*, shares,

(*g*) *Thomas* v. *Kelly* (1888), L. R. 13 App. Ca. 506; *Weardale Co.* v. *Hodson*, [1894] 1 Q. B. 598.

(*gg*) See *post*, ch. v., s. 13.

(*h*) *Peer* v. *Humphry* (1835), 2 A. & E. 495; *Lunn* v. *Thornton* (1845), 1 C. B. 379.

(*i*) *Miller* v. *Race* (1791), 1 Burr. 452.

(*k*) *Picker* v. *London and County Banking Co.* (1887), 18 Q. B. D. 515; *London and County Banking Co.* v. *River Plate Bank* (1888), 20 Q. B. D. 232; 21 Q. B. D. 535.

(*l*) *Hargreave* v. *Spink*, [1892] 1 Q. B. 25; Sale of Goods Act, 1893, s. 24.

stocks, and securities issued by companies and local authorities, any purported transfer of these by a person who is not the true owner is, of course, ineffectual to pass the title to them (*m*); wherefore, by the Forged Transfers Acts, 1891 and 1892, companies and local authorities may, as regards such shares, stocks, and securities, compensate the purchaser thereof for the loss he sustains through purchasing under a forged transfer thereof, or in pursuance of a forged power of attorney to transfer same. And the company or authority paying such compensation is remitted to all the rights and remedies of the innocent purchaser as against the person liable for the loss.

(*m*) *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 374; *London Join Stock Bank* v. *Simmons*, [1892] A. C. 201.

CHAPTER V.

OF TITLE BY CONTRACT.

A CONTRACT is not, strictly speaking, in itself a *title* to things personal or other property. Contracts give rise directly to rights *in personam*, that is to say, rights to compel another person to do or not to do something, and only indirectly to rights *in rem*, that is to say, rights in the nature of property. In a certain sense, however, every right under a contract may perhaps be regarded as a kind of *chose in action*, particularly where the contract in itself constitutes, or incidentally involves, an assignment of property ; as in the case of an actual loan of money, or an agreement for the sale of specific goods ready for delivery. Further, it may be said that every contract for the sale or disposition of property, if and so far as an action for specific performance of it would successfully lie, amounts in equity to an assignment of such property, and effectually vests in the person in whose favour it is made an equitable title to such property (*a*). It is therefore not inappropriate, and is in any case convenient, in this portion of the present work to consider the legal nature and effect of contracts, particularly those which directly or indirectly involve dispositions of, or affect the title to, chattels personal.

For this purpose, it is proposed in this chapter to deal in the first place with the rules of law relating to contracts in general, and in the next place to examine in greater detail certain particular classes of contracts.

(*a*) *Cf. Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9 ; *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499, at p. 506 ; *Raffety* v. *Schofield*, [1897] 1 Ch. 937.

Section 1.—On Contracts in General.

Sub-section (1).—*Definition and Essentials of a Contract.*

A *contract* is an agreement enforceable at law. The term "agreement," although frequently used as synonymous with the term "contract," is really an expression of greater width of meaning and less technicality. Every contract is an agreement, but not every agreement is a contract. In its colloquial sense, the term "agreement" would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other. An accepted invitation to dinner, for example, would be an agreement in this sense; but it would not be a contract, because it would neither be intended to create nor would it in fact create any legal obligation between the parties to it. It is sometimes even said, that an agreement which is intended to affect the *legal* relations of the parties does not necessarily amount to a contract in the strict sense of the term. For instance, a conveyance of land or a deed of gift of a chattel necessarily involves an agreement between the parties to it; but its primary legal operation is to effect a transfer of property. Similarly, the marriage ceremony constitutes an agreement between the parties to it; but its only direct legal result is to create the *status* of husband and wife. In cases of this kind, however, contractual obligations are almost always incidentally or consequentially created either by implication of law or otherwise; so that it is perhaps somewhat pedantic to regard them otherwise than as contracts for all practical purposes. They appear sufficiently to possess the distinguishing features of a contract, *i.e.*, (1) an agreement, and (2) legal enforceability.

The following are the essential conditions of a valid contract in English law:

(1.) *There must be an offer by one party to another accepted by that other.*

(2.) *There must be an intention to affect the legal relations of the parties.*

(3.) *Either there must be valuable consideration on both sides, or else the contract must be embodied in a deed.*

(4.) *In certain cases, for purposes of evidence or otherwise, certain common law or statutory requirements as to form or otherwise must be complied with, in order to render the contract enforceable.*

(5.) *The parties must possess legal capacity to contract.*

(6.) *The subject matter of the contract must be lawful.*

(7.) *There must be real consensus between the parties.*

In the following sub-sections we propose separately to consider each of these conditions in some detail, and to examine the chief rules affecting each.

Sub-section (2).—*Offer and Acceptance.*

Offer.—An offer may be made by one person to another in any manner either by writing, words, or conduct; but it is essential that it should be *communicated* in some way to such other person. Usually, of course, it is made by express words or writing, and such cases involve little difficulty. But it is equally effectual if deducible from some unequivocal act or conduct of a person (*b*); for instance, if a cabman plying for hire takes up a passenger, no word need be spoken on either side, yet there is a complete offer and acceptance implied from the conduct of the parties. Again, an offer need not be addressed to any specific individual; for instance, it may be contained in a general advertisement in a newspaper (*c*).

Acceptance.—As regards *acceptance*, this also may take place by express words or writing, or by implication from conduct. For instance, in the illustration above referred to, the fact of the passenger calling a cab and giving the

(*b*) *Crears* v. *Hunter* (1887), 19 Q. B. D. 341.

(*c*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 269.

usual directions as to his destination would be a sufficient acceptance of the cabman's implied offer. Again, if a tradesman sends goods on approval to the house of a person who retains and uses the goods, there is an implied acceptance of the goods and a corresponding liability to pay the price specified, if any, or, if none, a reasonable price (*d*). Difficult questions as to the limits of implied acceptance often arise in connection with what may, for convenience' sake, be called "ticket cases." Very many contracts at the present day, such as those with railway and similar companies, are made by the delivery by one party to another of a ticket or document in a common form embodying certain terms and conditions. The delivery of such a ticket really constitutes the offer of the party delivering it, and the other party by taking the ticket implicitly accepts such offer. If the latter party is aware of the nature of the terms and conditions stated on the ticket, and they are not fraudulently misleading, or even if he knows of their existence, although he may be ignorant of their exact effect, he is, in most cases, held to be bound by them on the ground of implied acceptance (*e*).

A more anomalous class of cases is that of advertisements, by which something is promised by the advertiser in return for some act. It is clear that any person performing the act, with knowledge of the advertisement and an intention to take advantage of it, will be deemed implicitly to have accepted the promise contained in it (*f*). And there has been held to be a binding contract in such cases, even though the act is done without the motive of complying with the advertisement.

A contract is complete as soon as the acceptance is communicated; and in this connection special mention must be made of acceptances through the post. It is now

(*d*) *Hart* v. *Mills* (1846), 15 M. & W. 87.

(*e*) *Richardson & Co.* v. *Rowntree*, [1894] A. C. 217; *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178.

(*f*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 269.

a well established rule of law, that an acceptance by letter is deemed to be communicated immediately it is posted, and similarly an acceptance by telegram would be complete as soon as the telegram was handed in for dispatch (*g*). It is, therefore, too late to revoke an offer if a letter of acceptance has been posted, even if the notice of revocation should in fact reach the offeree before the letter of acceptance reaches the offeror. And a posted acceptance makes a binding contract, even though it may be delayed or lost in the post (*h*).

As regards the manner of and time for acceptance of an offer, the offeror may of course prescribe special conditions; if he does not do so, an acceptance made within a reasonable time by any ordinary and reasonable means of communication is sufficient and effectual (*i*).

Revocation of an offer.—An offer is implicitly revoked if not accepted within the time specified by the offeror, or, in any case, within a reasonable time. It may also always be revoked if, at any time before acceptance, the offeror communicates to the offeree notice of revocation. And it has been held, that even notice received from a third party of the revocation, or of circumstances clearly negativing the continued subsistence of the offer, is sufficient revocation to preclude *subsequent* acceptance (*k*). There are, however, three cases in which an offer cannot be revoked, *i.e.*, (1) after a valid acceptance (*l*); (2) where the offer was made by a deed under seal; and (3) where there is an express agreement for valuable consideration to keep the offer open for a specified time. The last of these cases is what is commonly known as "an agreement for an option," and is a familiar incident in modern business

(*g*) *Henthorn* v. *Fraser*, [1892] 2 Ch. 27; *Cowan* v. *O'Connor* (1888), 20 Q. B. D. 640; *In re London and Northern Bank*, [1900] 1 Ch. 220.

(*h*) *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216.

(*i*) *Adams* v. *Lindsell* (1817), 1 B. & Ald. 681.

(*k*) *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463.

(*l*) *Xenos* v. *Wickham* (1866), L. R. 2 H. L. 296. [It may well be doubted whether the construction which has been put upon this decision is a correct one.—E. J.]

life. It is to be observed that such an option does not without consideration (or a deed) bind the offeror to keep the offer open; because it would lack the third essential condition of a valid contract above mentioned (*m*).

Identity of terms.—Finally, as regards the acceptance, it is important to remember, that the acceptance, to be effective, must be identical with the terms of the offer, and must be absolute. To take a simple illustration; if A. says to B., "I will sell you my horse for 100*l.*," and B. replies, "I accept, and will give you 90*l.* for it," there is no *consensus ad idem*, and therefore no contract (*n*). Again, if B. accepts the offer at the price mentioned by A., but upon some condition not referred to by A., there is no contract (*o*). Very difficult cases on this point frequently arise, where the acceptance of an offer refers to a formal document being prepared, or to the approval of the contract by the acceptor's solicitor. It is impossible here adequately to discuss this class of cases; but the general test applicable is, whether or not the acceptance is *intended* not to be final, but conditional on some further event. If it is made expressly "*subject to*" some further event, it is *primâ facie* a conditional acceptance, and there is no binding contract. But an agreement to embody the terms agreed upon in a more *formal* document, is not *necessarily* inconsistent with there being a complete and concluded *contract* (*p*).

Sub-section (3).—*Intention to Create Legal Relations.*

This is so obvious an essential that it requires little comment. There are very many engagements made in

(*m*) *Cook* v. *Oxley* (1790), 3 T. R. 653; *Henthorn* v. *Fraser*, *supra*; *Sutcliffe* v. *Wardle* (1890), 63 L. T. 329.

(*n*) *Hyde* v. *Wrench* (1840), 3 Beav. 334.

(*o*) *Cf. Hutchinson* v. *Bowker* (1839), 5 M. & W. 535; *Jones* v. *Daniel*, [1894] 2 Ch. 332.

(*p*) See generally, Fry's *Specific Performance*, 3rd ed. § 511; *Winn* v. *Bull* (1878), 7 Ch. D., at p. 32; *Rossitter* v. *Miller* (1878), L. R. 3 App. Ca. 1124; *Chipperfield* v. *Carter* (1895), 72 L. T. 487; *Page* v. *Norfolk* (1894), 70 L. T. 781; *Simpson* v. *Hughes* (1897), 76 L. T. 237; *Filby* v. *Hounsell*, [1896] 2 Ch. 737.

the ordinary course of life, which are agreements in the wide sense of the term, but are intended merely as arrangements of a social or friendly nature, and are in no way intended to bind the parties legally. For instance, as already stated, an accepted invitation to dinner could not reasonably be regarded as a contract. And so, an extravagant offer, made in jest or not intended to be taken seriously, would not usually be binding. It is possible that cases may occur somewhat near the borderline, and if so, it is a question of fact in each case as to whether a legal contract was or was not intended (*q*).

Incidentally here may be mentioned the necessity of distinguishing between mere information furnished in response to a request, and an acceptance of a definite offer. In the former case there is of course no contract (*r*).

Sub-section (4).— *Consideration or Seal.*

For any contract to be enforceable at law, it is essential *either* that it should be made under seal, *or else* that it should be made for valuable consideration.

By a contract under seal is meant one which is embodied in a *deed*, *i.e.*, a document in writing or print upon paper or parchment, "signed, sealed, and delivered" by the party against whom it is sought to be enforced (*s*).

As a matter of fact, it is extremely doubtful whether in ordinary cases (*i.e.*, apart from statutory requirement) the signing of a deed is essential to its validity ; but it is almost invariably done in practice, and is useful, as it raises a presumption that the sealing and delivery were regularly and effectually carried out (*t*).

A deed may be of two kinds, *i.e.*, (1) an *indenture* which is made between two or more parties, and (2) a *deed poll*,

(*q*) *E.g.*, *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256; *Week* v. *Tibold* (1606), Roll. Abr. 6.

(*r*) *Harvey* v. *Facey*, [1893] A. C. 552.

(*s*) Co. Litt. 35 b, 171 b.

(*t*) *Hall* v. *Bainbridge* (1848), 12 Q. B. 699.

which is made by one party only, although, of course, where it embodies a promise, it must be either expressly or tacitly accepted, however informally, by the person in whose favour it is made, in order to be legally effective (*u*). The distinction, however, has now no practical importance.

If a deed is delivered subject to a condition precedent, it is called an escrow, and is, in law, regarded only as an inchoate instrument until the specified condition is fulfilled (*x*).

It follows from what has been already stated, that a promise by deed is enforceable, although it is purely voluntary and unaccompanied by any benefit to the promisor. Hence a promise to make a *gift* of anything must be under seal; for instance, it has been held that a promise not by deed to subscribe to a charitable or philanthropic object is unenforceable (*y*). There are various other special cases in which, by common law or statute, a contract must be under seal. But these are irrespective of the question of consideration, and are, therefore, more appropriately dealt with hereafter (*z*).

Every contract not under seal must be based upon "valuable consideration." Expressed in simple terms, this means that in order that a party to it may be legally bound, he must have got some *quid pro quo* for his own promise. "*Valuable consideration*" has been more elaborately defined by judicial decision as consisting in "some right, interest, profit, or benefit accruing to one "party, or some forbearance, detriment, loss or responsi- "bility given, suffered, or undertaken by the other" (*a*).

The following points with regard to consideration will serve briefly to explain its legal position. (a) It may not

(*u*) *Cf. Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296.

(*x*) Co. Litt. 36 a; *London Freehold, etc. Co.* v. *Suffield*, [1896] 2 Ch. 608.

(*y*) *Creed* v. *Henderson* (1885), 33 W. R. 819; *Rann* v. *Hughes* (1778), 7 T. R. 350; *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57.

(*z*) Sub-section (5), *post*, p. 65.

(*a*) *Currie* v. *Misa* (1875), L. R. 10 Ex. 153; 1 App. Ca. 554.

only consist of something actually given or paid or done for the benefit of the promisor, but also of some "forbearance, detriment, loss, or responsibility" incurred by the other party. For instance, the following have been held to be sufficient considerations to support a promise: marriage, or a promise to marry the promisor (*b*); forbearance to sue on, or compromise of, a doubtful claim; labour or trouble undertaken; anything done at the request or invitation of the promisor and in reliance on the promise, even though it may not apparently benefit the promisor in the least (*c*). Indeed, instances might be multiplied indefinitely; but these must suffice for present purposes. (b) Consideration need not be adequate. Provided it is real and legally appreciable, it is recognised by law, however slight its apparent value may be. The old case of *Thornborow* v. *Whitacre* (*d*) is an amusing illustration of this point. But if consideration is grossly inadequate, the fact may, in some cases, be strong evidence of fraud, particularly where the surrounding circumstances are suspicious. It is not sufficient consideration for a person to promise another to do what he is already legally bound to do. In effect, this is no consideration at all. For instance, if A. owes B. 100*l.*, and B. subsequently promises to take 50*l.* in full satisfaction of the debt, or to take 50*l.* down and the rest by future monthly instalments, the promise is not binding (*e*). If, however, the smaller sum is agreed to be paid at an earlier date, or at a different place than originally agreed, the promise will be binding. So, also, if something is accepted of less value, but of a different nature than that owed, there would be sufficient consideration; for instance, if B. in the above case agreed

(*b*) *Synge* v. *Synge*, [1894] 1 Q. B. 466.

(*c*) *Shadwell* v. *Shadwell* (1860), 9 C. B. (N.S.) 159; *Bainbridge* v. *Firmstone* (1838), 8 A. & E. 743.

(*d*) (1706), 2 Ld. Raym. 1164.

(*e*) *Cumber* v. *Wane* (1719), 1 Strange, 426; *Foakes* v. *Beer* (1884), L. R. 9 App. Ca. 605; *Underwood* v. *Underwood*, [1894] P. 204.

to accept in lieu of the 100*l.* "a horse or a canary or a tomtit" (as JESSEL, M.R., once facetiously observed (*f*)), or a negotiable instrument (such as a cheque) for a smaller sum (*g*). (c) The consideration must not be illegal or immoral (*h*). (d) The consideration must not be something already *past*. For instance, if A., having already sold B. a horse, afterwards warrants the horse to be sound, B. cannot sue on the warranty, because the past sale was no sufficient consideration for it (*i*).

But where one person does something *at another's request*, and subsequently the latter promises something in consideration of the act done, this is said to be binding (*k*). So where B. has voluntarily done (and *à fortiori* where he has done under legal compulsion) what A. was legally bound to do, and A. subsequently, in consideration of such act, promises A. something, the promise is, perhaps, binding (*l*). And an express promise to pay a debt, the right of action in respect of which is barred under the Statutes of Limitation by lapse of time, is binding, if duly evidenced by writing.

Sub-section (5).—*Special Requirements as to Form, etc.*

Stamping.—As a general rule, no contract made in writing can be put in evidence in an action, unless it is duly stamped in accordance with the requirements of the revenue laws (*m*). The want of a stamp does not, however, usually invalidate a contract; and an unstamped agreement may be put in evidence on payment of the unpaid duty, and a further sum by way of a penalty.

(*f*) *Couldery* v. *Bartrum* (1881), 19 Ch. D. 394, p. 399.

(*g*) *Goddard* v. *O'Brien* (1882), 9 Q. B. D. 37.

(*h*) *Pearce* v. *Brooks* (1866), L. R. 1 Ex. 213.

(*i*) *Roscorla* v. *Thomas* (1842), 3 Q. B. D. 234.

(*k*) *Lampleigh* v. *Brathwait* (1616), Hob. 105.

(*l*) *Wing* v. *Mill* (1817), 1 B. & Ald. 104.

(*m*) The Stamp Act, 1891, ss. 22, 23, and 59, and the Schedule to the Act.

Seal.—Some contracts, quite apart from the question of whether or not they are made for valuable consideration, must be made by deed under seal. By the common law *corporations aggregate* must contract under seal, except in the following cases, *i.e.*, (1) where the contract relates to matters of trifling importance, daily occurrence, or urgent necessity (*n*) ; where the contract is by a trading corporation in the ordinary course of its business (*o*) ; (3) in certain cases of contracts by registered joint stock companies (*p*) ; and (4) in specifically enforceable contracts which have been partly performed (*q*).

There are also a number of contracts or assurances of a contractual nature required by *statute* to be by deed. The chief instances are the following : sales of shares under the Companies Clauses Act, 1845 ; leases of land for more than three years under the Statute of Frauds and the Real Property Act, 1845 ; sales of sculpture with copyright under the Sculpture Copyright Act, 1814.

Writing.—Simple contracts for valuable consideration are not required to be in writing by the common law ; but there are many cases in which writing is required by special statutes. The following are the chief instances : (1) bills of exchange and promissory notes, by the Bills of Exchange Act, 1882 ; (2) assignments of any debt or legal chose in action by the Judicature Act, 1873, s. 25 (*r*) ; (3) transfers of shares in a registered company by the Companies Acts, 1862 to 1900 ; (4) acknowledgments of debts and liabilities barred by the Statutes of Limitation ; (5) assignments of copyright by the Copyright Acts ; (6) agreements between masters and seamen by the Merchant Shipping Act, 1894 ; (7) contracts of marine insurance by the Stamp Act, 1891 ; (8) special contracts

(*n*) *Clarke* v. *Cuckfield Union* (1852), 21 L. J. Q. B. 349.

(*o*) *South of Ireland Colliery Co.* v. *Waddle* (1869), L. R. 4 C. P. 617.

(*p*) Companies Act, 1867, s. 37.

(*q*) *Mayor of Oxford* v. *Crow*, [1893] 3 Ch. 535.

(*r*) See p. 175, *post*.

of carriage limiting the liability of railway companies by the Railway and Canal Traffic Act, 1854 ; (9) contracts for the sale of goods of the value of 10*l.* and upwards by the Sale of Goods Act, 1893 ; and (10) contracts within s. 4 of the Statute of Frauds.

The only ones of these which, for present purposes, require special comment are the last two. As regards *contracts for the sale of goods*, the subject is fully dealt with later on. As regards the fourth section of the Statute of Frauds, it provides that *no action shall be brought* upon any of the following five classes of contracts "unless the agree-"ment upon which such action shall be brought, or some "memorandum or note thereof, shall be in writing and "signed by the party to be charged therewith, or some "other person by him lawfully authorised."

The contracts in question are these : (1) any special promise by an executor or administrator to answer damages out of his own estate ; (2) contracts of surety-ship or guarantee (*s*) ; (3) agreements "in consideration of marriage" (*i.e.*, agreements to give or settle money or property upon a marriage, *not mere promises to marry*) ; (4) agreements "not to be performed within a year" (*i.e.*, not *capable* of being performed *on either side* within a year (*t*) ; and (5) contracts relating to land or any interest in land (*i.e.*, agreements for the sale or letting of land, or in any way *directly* concerning or affecting land).

In order to satisfy the requirements of the statute, the following conditions must concur : (1) There must be a note or memorandum of the contract in writing. It may consist of one or several documents ; but, in the latter case, the documents must be clearly referable to and connected with each other (*u*). (2) The parties must be described

(*s*) See later on p. 140, and see *Harburg, etc. Co.* v. *Martin*, [1902] 1 K. B. 778.

(*t*) *Peter* v. *Compton* (1694), Skin. 353 ; *Milsom* v. *Stafford* (1899), 80 L. T. 590 ; *Pearce* v. *Gardner*, [1897] 1 Q. B. 688.

(*u*) *Boydell* v. *Drummond* (1809), 11 East, 142 ; *Jones* v. *Joyner* (1900), 82 L. T. 768.

either *by* name, or in some other way sufficiently clearly to identify them (*x*). (3) The subject-matter must be described so as to be identifiable (*y*). (4) The consideration (except in the case of contracts of suretyship and guarantee under the Mercantile Law Amendment Act, 1856) must be stated, or capable of reasonable inference from the memorandum (*z*). (5) All other *material* terms must appear, expressly or by reasonable inference, in the memorandum, *e.g.*, the date of commencement of a lease (*a*). (6) The agreement must be final and concluded, as in the case of all other contracts. (7) The memorandum must be signed by the party against whom the agreement is sought to be enforced, or by his agent (*b*). And, finally (8) the memorandum must be in existence before any action brought to enforce the contract (*c*).

There are, however, certain exceptional cases to which the Statute of Frauds does not apply (*d*), *i.e.* (1) in sales by order of the court; (2) where the defendant admits the contract; (3) where the plea of the statute would "cover fraud" (*e*); and (4) where there is a valid parol agreement followed by *part performance*.

The last of these cases requires a short explanation. The doctrine of *part performance* is, in origin, an equitable one, though it is now enforceable in every branch of the Supreme Court, and also in county courts, so far as these

(*x*) *Coombs* v. *Wilkes*, [1891] 3 Ch. 77; *Carr* v. *Lynch*, [1900] 1 Ch. 613; *Pattle* v. *Anstruther* (1894), 69 L. T. 174.

(*y*) *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90; *Plant* v. *Bourne*, [1897] 2 Ch. 281.

(*z*) *Wain* v. *Warlters* (1804), 5 East, 10; *Re Eyre* (1895), 72 L. T. 585.

(*a*) *Humphery* v. *Conybeare* (1899), 80 L. T. 40; *Re Alexander's Timber Co.* (1901), 70 L. J. Ch. 767.

(*b*) *Sims* v. *Landray*, [1894] 2 Ch. 318; *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; *Bell* v. *Balls*, [1897] 1 Ch. 663.

(*c*) *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357.

(*d*) See, generally, Fry, *Specific Performance*, 562—578.

(*e*) *In re De Nicols*, [1900] 2 Ch. 410.

have equitable jurisdiction (*f*). It applies to all contracts of a kind of which specific performance can be granted (*g*). In order that any acts may constitute part performance in this sense, the following conditions must be satisfied (*h*): (1) They must be such as to be *unequivocally referable* to the alleged contract; (2) and such as to render it a fraud in the defendant to take advantage of the contract not being in writing; (3) the contract must be such as in its own nature is enforceable by the court; and (4) there must be proper *parol* evidence of the contract which is let in by the acts of part performance.

The following things have been held to be sufficient part performance: Taking possession of property; continuance of a tenant in possession at an increased rent; expenditure of money in buildings or improvements; and delivery of title deeds under a parol agreement for mortgage (*i*).

On the other hand, the following have been held to be insufficient: acts ancillary or introductory to completion of the contracts; payment of purchase money on a sale; marriage; payment of rent under a parol agreement for a lease; and continuance in the service of an employer (*k*).

Other requirements.—By statute in certain cases there are certain other requirements, *e.g.*, bills of sale and transfers of British ships have to be *registered* in a public register; disentailing deeds and assurances to charities have to be *enrolled*, and certain contracts with companies have to be *filed* with the Registrar of Companies. It is not, however, necessary to consider these in detail.

(*f*) *Foster* v. *Reeves*, [1892] 2 Q. B. 255.

(*g*) *McManus* v. *Cooke* (1887), 35 Ch. D. 681.

(*h*) See Fry, *Specific Performance*, 580, and see SELBORNE, L.C., in *Maddison* v. *Alderson* (1883), L. R. 8 App. Ca. 476 *et seq.*

(*i*) *Ungley* v. *Ungley* (1877), 5 Ch. D. 887; *Miller* v. *Sharp*, [1899] 1 Ch. 622; *Lester* v. *Foxcroft* (1701), 2 Wh. & Tud. L. C. 460.

(*k*) *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123; *Maddison* v. *Alderson* (1883), L. R. 8 App. Ca. 467.

Sub-section (6).—*Legal Capacity of Parties.*

The general rule is, that any person is legally capable of entering into a contract valid by English law, including even foreigners. But there are certain exceptional cases in which such capacity, for some reason, does not exist, or exists only subject to limitations. The chief cases are those of contracts by the following persons, *i.e.*, (1) alien enemies ; (2) foreign sovereigns or governments ; (3) foreign ambassadors and their suites ; (4) convicted felons ; (5) infants ; (6) married women ; (7) lunatics ; (8) drunken persons ; and (9) corporations. It will be desirable briefly to consider these in order.

(1) *Alien enemies.*—Contracts with alien enemies, if made before war with their state, are in suspense, and not enforceable during the war ; but if made during the war, they are void *ab initio* (*l*).

(2) *Foreign sovereigns.*—Foreign sovereigns or governments can make contracts valid by English law, but such contracts cannot be enforced in our courts against them, except where they *voluntarily* appear and submit to the jurisdiction (*m*).

(3) *Foreign ambassadors and their suites.*—The rule last mentioned also applies in this case, with the possible exception (not clearly decided) that if an ambassador or member of his suite engages in trade, he may be sued here on a contract entered into by him. Subject to this exception, the Diplomatic Privileges Act, 1708, makes "null and void" any writ or other process against such persons. (See generally *Musurus Bey* v. *Gadban*, [1894] 1 Q. B. 533.)

(*l*) *Willison* v. *Paterson* (1816), 7 Taunt. 439 ; *Janson* v. *Driefontein Mines*, [1902] A. C. 484.

(*m*) *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149 ; *Castaneda* v. *Clydebank Co.*, [1902] A. C. 524 ; *South African Republic* v. *Transvaal Railway*, [1898] 1 Ch. 190.

(4) *Convicted felons.*—By s. 8 of the Forfeiture Act, 1870, "every convict shall be incapable of alienating or charging any property or of making any contract."

(5) *Infants.*—At common law an infant's contracts were all *voidable* at his option, except in certain cases, such as contracts for necessaries. This rule is now modified by the Infants' Relief Act, 1874, which in effect enacts (a) that all contracts by infants for money lent or to be lent, or goods supplied or to be supplied, and all accounts stated, shall be absolutely void; and (b) that no ratification after majority of a contract made during minority shall be valid. The Act, however, excepts contracts for *necessaries*, and contracts which before the Act were binding on an infant and not voidable by him.

As the law stands at present, the result may shortly be stated as follows. Generally speaking, all contracts by an infant are in effect void, either as being so *ab initio*, or as being incapable of ratification, although money paid by an infant under such a contract, of which he has had the benefit, cannot be recovered back by him (*n*). But there are several important exceptions, as follows: (1) An infant is liable to pay a reasonable price for "*necessaries*" sold and delivered to him (Sale of Goods Act, 1893, s. 2). "Necessaries" are defined by the Act as meaning "goods suitable to the condition in life of such infant, and to his actual requirements at the time of sale and delivery." It is obvious that many things, such as medicine and reasonable food and clothing, are essentially necessaries, whereas articles of mere ornament or luxury, or things with which the infant is already well supplied, would not be "necessaries" (*o*). But there are many cases on the border line which have to be decided on the particular

(*n*) *Valentini* v. *Canali* (1889), 24 Q. B. D. 166.

(*o*) *Peters* v. *Fleming* (1840), 6 M. & W. 42; *Ryder* v *Wombwell* (1868), L. R. 4 Ex. 32; *Johnstone* v. *Marks* (1887), 19 Q. B. D. 509; *Heidlings* v. *Graham* (1901), 84 L. T. 497.

facts (p). An infant is not liable on a bill of exchange given in payment of necessaries (q). (2) An infant is bound by certain (and *semble* any) contracts (other than for money lent or goods supplied, or on an account stated) which are fair and reasonable and unequivocally for his benefit, *e.g.*, a proper contract of apprenticeship or service (r). (3) Contracts which by custom or special statute are binding, *e.g.*, marriage settlements made with the approval of the court under the Infants' Settlement Act, 1855. (4) An infant is in some cases liable after majority on a contract, unless he expressly repudiates it within a reasonable time, *e.g.*, a marriage settlement by (s), or a lease of real property granted to, an infant. Finally, it may be observed that, to make an adult liable on a debt or obligation contracted during infancy, an actual new promise, after attaining majority, must be proved, and not a mere ratification.

(6) *Married women.*—At common law, with a few exceptions, a married woman could not contract at all. In equity, she was allowed to bind her "separate estate" by her contracts. Now, by the Married Women's Property Acts, 1870, 1874, 1882, and 1893, her position is that she is *personally* liable for her *ante-nuptial* debts (t); and she can during marriage enter into any contract, as if she were a *feme sole*; and such contract binds all her separate property, whether existing at the time of the contract or acquired afterwards, except property which is subject to restraint on anticipation (u).

A judgment against a married woman upon a post-

(p) *E.g.*, *Clyde Cycle Co.* v. *Hargreaves* (1898), 78 L. T. 296.

(q) *Re Soltykoff*, [1891] 1 Q. B. 413; but consider *Walter* v. *Everard*, [1891] 2 Q. B. 369.

(r) *Clements* v. *London and North Western Rail. Co.*, [1894] 2 Q. B. 482; *Fellows* v. *Wood* (1899), 59 L. T. 513.

(s) *Edwards* v. *Carter*, [1893] A. C. 360.

(t) *Robinson* v. *Lynes*, [1894] 2 Q. B. 577.

(u) See the Act of 1882, s. 1, and the Act of 1893, s. 1; *Sweet* v. *Sweet*, [1895] 1 Q. B. 12; *Hood-Barrs* v. *Cathcart*, [1894] 2 Q. B. 559.

nuptial liability cannot, however, be enforced against her personally, but only against her property (*x*).

Although a married woman's contract is presumed to bind her own separate property, yet, in certain cases, her husband may be exclusively or jointly liable for it. For instance, he is exclusively liable for *necessaries* ordered by his wife for herself or the household, except where he has expressly forbidden her to pledge his credit, or the tradesman to give her credit, or where she is already well supplied with goods of the kind in question (*y*).

But where the parties are separated, the husband is not liable, unless the separation is owing to his own misconduct, and he fails to make her an adequate allowance for maintenance (*z*).

(7) *Lunatics.*—A lunatic's contract is binding upon him, unless it can be shown that the other contracting party was aware at the time of the contract that he was dealing with a person of unsound mind (*a*). And in any case a lunatic is liable to pay a reasonable price for "*necessaries*" sold and delivered to him (*b*).

(8) *Drunken persons.*—The rule as to these is practically the same as that applicable to lunatics. But it is obvious that it would in most cases be less easy for the party seeking to enforce the contract to prove his ignorance of the intoxication than of the insanity of the other party.

(9) *Corporations.*—A corporation at common law has, generally speaking, the same capacity to contract that a natural person has. But statutory or chartered corporations are subject to any restriction imposed by the statute or charter creating them. And joint stock companies

(*x*) *Scott* v. *Morley* (1887), 20 Q. B. D. 120.

(*y*) *Manby* v. *Scott* (1659), 1 Sid. 112; *Seaton* v. *Benedict* (1828), 5 Bing. 28; *Debenham* v. *Mellon* (1880), L. R. 6 App. Cas. 24; *Morel* v. *Westmoreland* (1902), 51 W. R. 290.

(*z*) *Eastland* v. *Burchell* (1878), 3 Q. B. D. 432.

(*a*) *Imperial Co.* v. *Stone*, [1892] 1 Q. B. 599.

(*b*) *Re Rhodes* (1880), 44 Ch. D. 94; Sale of Goods Act, 1893, s. 2.

and other companies created by or under statute for particular purposes are strictly limited to the powers, of contracting and otherwise, conferred by their memorandum of association, or by the special statute creating them (*c*).

Sub-section (7).—*Legality of subject matter.*

A contract which is illegal is, of course, unenforceable; but the mere fact that a contract legal in itself might be performed in an illegal manner, does not necessarily avoid it, unless an intention so to perform it can be proved (*d*). A bond or other security given for a debt originating in an illegal transaction, is deemed by law to be tainted with the original illegality, and is therefore unenforceable (*e*). But where the contract was merely *void* and not *illegal* in the sense of being *prohibited*, a security given in respect of it, if under seal, is enforceable (*f*). Again, money paid under an *illegal* agreement, which has been executed wholly or in a material part, cannot be recovered, on the principle "*in pari delicto melior est conditio possidentis.*" But if the agreement has not yet been carried out in any material respect, the money may be recovered back (*g*). Money paid to a stakeholder to abide the event of a wager can also be recovered in any case, if notice reclaiming it is given before it has been actually paid over to the owner (*h*).

If a party who has paid money under an illegal contract has done so innocently, or under such circumstances that he cannot be regarded as *in pari delicto*, he can recover it, even after performance of the contract.

Where part only of a contract is illegal, a promise which

(*c*) *Ashbury Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653; *Newcastle-on-Tyne* v. *Attorney-General*, [1892] A. C. 568.

(*d*) *Waugh* v. *Morris* (1873), L. R. 8 Q. B. 202.

(*e*) Negotiable instruments stand on a special footing. (See *post*, p. 158.)

(*f*) *Fisher* v. *Bridges* (1854), 3 E. & B. 642.

(*g*) *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291; *Kearley* v. *Thomson* (1890), 24 Q. B. D. 746.

(*h*) *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166.

can be separated from the illegality may be valid (*i*). Finally, it should be remembered that a contract originally legal may become discharged, owing to illegality subsequently supervening (*j*).

Contracts may be illegal either (1) at common law or (2) by statute. Illegality in the former case is usually based on grounds of immorality, criminality, or antagonism to public policy. In statutory cases, regard is to be had merely to the express provisions of the statute, though, of course, the *ratio legis* would generally be based on similar grounds to those just mentioned. A statute may prohibit a contract either expressly or by clear implication. The fact of a statute imposing a penalty presumptively implies a prohibition (*k*).

On the other hand, it may be observed that if a contract is expressly confirmed by Act of Parliament, every clause in it has statutory validity (*l*).

We will consider, briefly, the chief classes of illegal contracts. For the purposes of the present work, only a few kinds require any detailed explanation.

I. Contracts Illegal by Common Law.

(1) *Contracts tending to interfere with the Government: e.g.*, agreements involving bribery or undue influence at elections (*m*); agreements for the sale of public offices; agreements for the procuring of titles of honour for a consideration (*n*); agreements for the sale of public officials' salaries or pensions for continuing or future public services (*o*).

(*i*) *Pickering* v. *Ilfracombe Railway* (1868), L. R. 3 C. P. 250.

(*j*) *O'Neil* v. *Armstrong*, [1895] 2 Q. B. 418.

(*k*) *Cope* v. *Rowlands* (1836), 2 M. & W. 149.

(*l*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37.

(*m*) *Cooper* v. *Slade* (1857), 6 H. L. C. 746; *Coppock* v. *Bower* (1838), 4 M. & W. 361.

(*n*) *Egerton* v. *Brownlow* (1853), 4 H. L. C. 1.

(*o*) *Lucas* v. *Harris* (1887), 18 Q. B. D. 127.

(2) *Contracts tending to impede the administration of justice: e.g.*, agreements tending to pervert the course of justice, for instance, to pay a witness in proportion to the amount recovered at the trial; or to indemnify a person who goes bail for a prisoner (*p*).

(3) *Contracts for the encouragement or procuring of crimes: e.g.*, an agreement to commit a murder, or an agreement between several persons to buy shares in a company in order to induce the public to believe that there is *bonâ fide* market in such shares (*q*).

(4) *Contracts to compound criminal prosecutions: e.g.*, to acknowledge the signature on a forged bill in consideration of the holder forbearing to prosecute the forger (*r*). But the mere existence of a threat of criminal proceedings does not vitiate a contract, if there is no agreement to abstain from prosecuting (*s*). And the compromise of a claim for damages is valid, even though the injured party may have an alternative remedy of a public nature by prosecution (*t*).

(5) *Contracts in the nature of maintenance or champerty: e.g.*, an indemnity against costs given to a party for the purpose of maintaining a suit in which the person indemnifying has no *bonâ fide* interest; or an agreement for the sale of the right to any damages recovered in a pending suit (*u*).

(6) *Contracts with an enemy Government* or its subjects in time of war (*x*). But there is an exception where the Crown grants a licence to trade with the enemy.

(*p*) *Collins* v. *Blantern* (1767), 1 Sm. L. C. 355; *Consolidated, etc. Co.* v. *Musgrave*, [1900] 1 Ch. 37.

(*q*) *Scott* v. *Brown*, [1892] 2 Q. B. 724.

(*r*) *Brook* v. *Hook* (1871), L. R. 6 Ex. 89; *Collins* v. *Blantern* (1767), 1 Sm. L. C. 369.

(*s*) *Jones* v. *Merioneth Building Society*, [1892] 1 Ch. 173.

(*t*) *Windhill* v. *Vint* (1890), 45 Ch. D. 351.

(*u*) See, generally, *Bradlaugh* v. *Newdigate* (1883), 11 Q. B. D. 11; *Alabaster* v. *Harness*, [1895] 1 Q. B. 339; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437.

(*x*) *Willison* v. *Pattison* (1819), 1 Taunt. 439; *Janson* v. *Driefontein Mines*, [1902] A. C. 484.

(7) *Contracts in restraint of marriage.* But the restraint must be *general*, and not merely restricting marriage with a particular individual or class (*y*).

(8) *Contracts for procuring marriages for reward: e.g.*, a promise to pay money to a man in consideration of his consent to his daughter's marriage (*z*).

(9) *Contracts for immoral consideration: e.g.*, in consideration of future illicit cohabitation. But if in consideration of past cohabitation they are not illegal, but merely void for want of consideration (*a*).

(10) *Contracts for future separation of husband and wife.* It is immaterial whether these are made before or after marriage. But an agreement to terminate differences by an *immediate* separation is valid (*b*).

(11) *Contracts to deprive parents of the custody of their children* (*c*). But an agreement between the father and the mother, to give the custody to the latter, may be good under the Custody of Infants Act, 1873, s. 2. An agreement by a father depriving him of the control of the religious education of his child is also void (*d*).

(12) *Contracts in restraint of trade.* These are illegal on grounds of public policy. The rules upon the subject were, until recent years, in some respects not altogether free from doubt; but they have now been clearly defined by the House of Lords in the case of *Nordenfeldt* v. *Maxim Nordenfelt Co.*, [1894] A. C. 535. By this and subsequent cases it is established, that a covenant or other contract in restraint of trade is legal and enforceable, provided that it

(*y*) *Scott* v. *Tyler* (1787), 1 Wh. & Tud. L. C. 535.

(*z*) *Hall* v. *Potter* (1695), 3 Lev. 411.

(*a*) *Beaumont* v. *Reeve* (1845), 8 Q. B. 482; *Pearce* v. *Brooks* (1866), L. R. 1 Ex. 213; *Phillips* v. *Prohyn*, [1899] 1 Ch. 811.

(*b*) *Wilson* v. *Wilson* (1847), 1 H. L. C. 538; *Hunt* v. *Hunt*, [1897] 2 Q. B. 547.

(*c*) *Humphrys* v. *Polak*, [1901] 2 K. B. 385.

(*d*) *Agar Ellis* v. *Lascelles* (1879), 10 Ch. D. 49.

complies with two conditions, *i.e.*, (1) that the restraint is no wider than is reasonably necessary for the protection of the person in whose favour it is imposed, and (2) that it is not injurious to the public interests on any specific ground (*e*).

Subject to these two conditions, a restraint is not now regarded as illegal, even though it may be unlimited in point of space, or extending to the whole life of the covenantor. Each case must accordingly be decided upon its merits; and the court will have regard to all the circumstances in considering whether a case fulfils the conditions above mentioned (*f*). A restraint may be partly good and partly bad, and in such a case, if upon a reasonable construction of the contract, the restriction is divisible, the court will enforce it so far as it is free from objections (*g*).

The burden of proving that a restraint in any given case is unreasonable lies upon the party who asserts such a contention (*h*). The law does not *imply* any restraint against carrying on a competing trade in the case of a sale of the goodwill of a business; but the court will restrain the vendor in such a case from soliciting former customers of the firm (*i*).

Combinations of workmen for the purpose of restricting the free employment of labour or the free conduct of trade are illegal at common law, as operating in restraint of trade. But there is a statutory exception in the case of trades unions by the Trade Union Acts, 1871 and 1876.

Similarly, combinations of traders or employers for purposes operating in restraint of trade are illegal (*k*).

(*e*) See also *Underwood* v. *Barker*, [1899] 1 Ch. 300; *Haynes* v. *Doman*, [1899] 2 Ch. 13.

(*f*) See various cases cited in the notes to *Mitchell* v. *Reynolds* (1711), 1 Sm. L. C. 391.

(*g*) *Dalowski* v. *Goldstein*, [1896] 1 Q. B. 478; *Haynes* v. *Doman*, *supra*.

(*h*) *Haynes* v. *Doman*, *supra*.

(*i*) *Trego* v. *Hunt*, [1896] A. C. 7; *Jennings* v. *Jennings*, [1898] 1 Ch. 378.

(*k*) *Hilton* v. *Eckersley* (1856), 6 E. & B. 47; but distinguish

II. CONTRACTS ILLEGAL OR VOID BY STATUTE. The chief instances of these are as follows:

(1) *Gaming and wagering contracts.*—A not very satisfactory definition of a "wager" was given by the Court in the case of *Hampden* v. *Walsh* (1876), 1 Q. B. D. 192, as "a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying money to him on the event not happening." The definition might be somewhat improved if the word "uncertain" were inserted before the word "event." At common law, wagers and bets were not unlawful, and could be enforced by action, except where they were of an indecent nature, or calculated to disturb the peace, or contrary to public policy. They are now governed by certain statutes.

By the Gaming Act, 1710, as amended by the Gaming Act, 1835, s. 1, all bills and other securities given in consideration of a wager or bet, are deemed to be given for an illegal consideration (*l*).

By the Gaming Act, 1845, it is enacted that "all contracts or agreements . . . by way of gaming or wagering, shall be null and void; and no suit shall be brought . . . for recovering any sum of money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always that this enactment shall not be deemed to apply to any subscription or contribution . . . for or towards any plate, prize, or sum of money to be awarded to the winner . . . of any lawful game, sport, pastime or exercise."

The Act extends to bets and wagers of every kind, including speculations in "differences," and time bargains in stock and shares; and the court will look at the real

Mogul S. S. Co. v. *MacGregor, Gow & Co.*, [1892] A. C. 25. And see generally, *Allen* v. *Flood*, [1898] A. C. 1; *Quinn* v. *Leathem*, [1901] A. C. 495; *Read* v. *Society of Stonemasons*, [1902] 2 K. B. 732.

(*l*) *Woolf* v. *Hamilton*, [1898] 2 Q. B. 337.

and not merely the ostensible intention of the parties to any contract, to ascertain whether or not it is within the scope of the Act (*m*).

By the Gaming Act of 1892, any promise to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract or of any services in relation thereto, is null and void; and no action may be maintained to recover any such sum of money (*n*).

It must be observed that the Acts only make bets *void*, not *illegal*, in the strict sense. Consequently, if a commission agent is employed to make a bet for another person, he can be forced by action to pay over to the latter the amount of any winnings (*o*). The Act of 1892, however, now prevents a commission agent, in the converse case, from suing his principal for money paid in satisfaction of a lost bet. Again, money deposited with a stakeholder to abide the result of a bet, may be recovered on notice given at any time before payment over to the winner (*p*). A somewhat similar rule applies in the case of lotteries (*q*).

(2) *Simoniacal contracts.*—By the statute 31 Eliz. c. 6, contracts to present a parson to a vacant "benefice with cure of souls" for valuable consideration, are void, as savouring of the ecclesiastical offence of simony (*r*).

(3) *Contracts by certain professional practitioners.*—By the Solicitors Acts, 1843 and 1870, costs for work done as an attorney or solicitor cannot be recovered, unless the plaintiff

(*m*) *Re Gieve*, [1899] 1 Q. B. 794; *Diggle* v. *Higgs* (1877), L. R. 2 Ex. D. 422.

(*n*) *Tatam* v. *Reeve*, [1893] 1 Q. B. 44; *Saffery* v. *Mayer*, [1901] 1 K. B. 11; *Carney* v. *Plimmer*, [1897] 1 Q. B. 634.

(*o*) *De Mattos* v. *Benjamin* (1894), 63 L. J. Q. B. 248.

(*p*) *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698; *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166; *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497.

(*q*) *Barclay* v. *Pearson*, [1893] 2 Ch. 154.

(*r*) *Fox* v. *Bishop of Chester* (1829), 6 Bing. 1.

was duly admitted and enrolled as a certificated solicitor. The Medical Act, 1858, s. 32, similarly prevents any action being brought in respect of fees for medical or surgical advice or services, unless the plaintiff is duly registered as a qualified practitioner. Under the Apothecaries Act, 1815, the Pharmacy Act, 1868, the Dentists Act, 1878, and the Veterinary Surgeons Act, 1881, there are similar restrictions with regard to apothecaries, chemists, dentists, and veterinary surgeons respectively.

(4) *Contracts within the "Tippling Acts."*—By the statute 24 Geo. 2, c. 40, s. 12, and the County Courts Act, 1888, s. 182, provisions are made restraining actions in respect of certain debts and contracts on account of liquor "consumed on the premises," or supplied in less than a given quantity at one time.

(5) *Contracts within the Truck Acts*, 1831, 1887, *and* 1896.—The effect of these Acts, shortly stated, is to render void contracts for the payment of wages otherwise than in money, and contracts by servants to spend wages at particular shops.

(6) *Contracts within the Weights and Measures Acts*, 1878, *and the Coinage Act*, 1870, *s.* 6, which provide in effect, that all contracts by weight or measure, or relating to money shall (with certain exceptions) be made in accordance with the imperial statutory weights or measures, or the current coin of the realm, respectively.

(7) *Insurance contracts in certain cases.*—By the Marine Insurance Act, 1745, s. 1, so far as regards marine insurance, and by the Gambling Act, 1774, so far as regards life, fire, and other insurances, policies are void except in so far as the person insured had an "*insurable interest*" in the subject-matter of the policy. An interest, to be "insurable" in this sense, must, generally speaking, be a pecuniary interest; but a man is always deemed to have such an interest in his own life (*s*).

(*s*) *Barnes* v. *London, etc. Assurance Co.*, [1892] 1 Q. B. 864; *Anctil* v. *Manufacturers' Association*, [1899] A. C. 604.

Sub-section (8).—*Reality of Consensus.*

The reality of the *consensus* of the parties to an agreement may be vitiated by the following circumstances, *i.e.* (A) Mistake; (B) Misrepresentation, either innocent or amounting to Fraud; (C) Duress; and (D) Undue influence. It will be necessary to consider in detail the nature of each of these circumstances, and its precise legal effect upon an agreement.

(A) *Mistake.*—The principles upon which mistake is held to vitiate a contract, are somewhat difficult in their application. It is necessary in the first place to observe, that mistake must be distinguished from mere *forgetfulness*, which is not a ground for relief (*t*). In the next place, mistake affecting the agreement itself must be distinguished from mistake in the *expression* of the terms of the agreement. In the latter case, no relief, generally speaking, is given unless the mistake was mutual. Cases of this kind usually arise where an agreement has been reduced to writing, and the writing, by clerical error or otherwise, does not properly express the common intention of the parties. In this case, equity will rectify the written contract (*u*). True mistake must also be distinguished from cases of fraud or misrepresentation by the other party to the contract. Such cases come under the heads dealt with later on. Further, a careful distinction must be drawn between mistakes of *fact* and of *law*. Mistake of law is usually not a ground upon which a party can be relieved from a contract. *Ignorantia juris non excusat* (*x*). So, money paid under mistake of law, or by compulsion of

(*t*) *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417; *Eastern Telegraph Co.* v. *Dent*, [1899] 1 Ch. 835.

(*u*) See *Ionides* v. *Pacific Insurance* (1872), L. R. 7 Q. B. 517; *Olley* v. *Fisher* (1887), 34 Ch. D. 367; *Caird* v. *Moss* (1886), 33 Ch. D. 30; *May* v. *Platt*, [1900] 1 Ch. 616.

(*x*) *Stewart* v. *Kennedy* (1890), L. R. 15 App. Ca. 108; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534.

legal proceedings, cannot, as a rule, be recovered (*y*). There are, however, a few exceptions in which relief is given, *i.e.* (1) mistake as to matters of private *right* or *title* (*z*); (2) mistake as to foreign law, which is regarded as a fact (*a*); (3) mistake of law caused by the other party to the contract, though the limits of this exception are somewhat doubtful (*b*); and (4) the case of money paid by mistake of law to an officer of the court, such as a receiver, trustee in bankruptcy, or official liquidator (*c*).

Coming then to *mistakes of fact with reference to the agreement itself*, as distinguished from the cases hitherto mentioned, the rule is that a contract induced by such mistake may be avoided in the following classes of cases: (1) *Where the mistake is as to the very nature of the contract itself*, *e.g.*, if A. signs a promissory note thinking that he is merely attesting a deed or other document (*d*). But such cases are not relievable unless the belief of the mistaken party is not attributable to his own negligence, and therefore can seldom or never arise, except where the mistake has been induced by the fraud of the other contractor or of a third party. (2) *Where the mistake is as to the identity of the person contracted with*, *e.g.*, where A. agrees to sell goods to B., believing him to be C. (*e*). Here again, however, relief would probably not be granted, except where B. acted fraudulently in the matter, or knew that A. believed he was contracting with C. and not with B. himself. (3) *Where there is a common mistake as to the identity of the subject matter of the contract*, *e.g.*, where

(*y*) *Moore* v. *Fulham Vestry*, [1895] 1 Q. B. 399; *Rogers* v. *Ingham* (1876), 3 Ch. D. 351; *Ward* v. *Wallis*, [1900] 1 Q. B. 675.

(*z*) *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 170; *Daniel* v. *Sinclair* (1881), L. R. 6 App. Ca. 181.

(*a*) *Leslie* v. *Baillie* (1837), 2 Y. & C. 91.

(*q*) *Stewart* v. *Kennedy*, *supra*.

(*c*) *Re Opera*, [1891] 3 Ch. 260; *Ex parte Rhoades*, [1899] 2 Q. B. 347; *Ex parte Simmonds* (1885), 16 Q. B. D. 308.

(*d*) *Thoroughgood's Case*, 2 Co. Rep. 9; *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *Lewis* v. *Clay* (1898), 67 L. J. Q. B. 224.

(*e*) See *Lindsay* v. *Cundy* (1878), L. R. 3 App. Ca. 459; *Gordon* v. *Street*, [1899] 2 Q. B. 641.

there is a contract for sale of a cargo "to arrive ex '*Peerless*' from Bombay," and, there being two ships answering that description, the buyer means one and the seller the other (*f*). (4) *Where there is a common mistake as to the existence of the subject matter of the contract, e.g.*, where A. contracts to sell to B. a cargo of corn, which, in fact, has, at the date of the sale, ceased to exist (*g*). (5) *Where the mistake is as to the intention of the other party and is known to such other party, e.g.*, if A. agrees to buy from B. certain goods, desiring goods of a particular kind, and believing that B. is promising to sell him goods of that particular kind, and B. knows that A. has such a belief, though the goods are not, in fact, of the kind in question (*h*).

On the other hand, it must be remembered that, except in the above cases, a unilateral mistake on the part of one contractor, whether it arises from negligence or ignorance or otherwise, does not entitle him to avoid the contract. So, if A. bids at an auction for a specified lot, thinking that it comprises different property from what it in fact comprises, he is bound; or if A. buys an old edition of Shakspere from B., believing, in reliance on his own knowledge and without any representation from B., that it is a first folio, he cannot get off his bargain, even though B. was perfectly aware that the book was not a first folio (*i*). But, even in unilateral mistakes such as these, if the other party seeks equitable relief in the shape of specific performance of the contract, the court will, on equitable considerations of great hardship or otherwise, sometimes refuse to enforce the contract, though the mistake would be no answer to a claim at common law (*k*).

(*f*) *Raffles* v. *Wichelhaus* (1863), 2 H. & C. 906.

(*g*) *Couturier* v. *Hastie* (1850), 5 H. L. C. 673.

(*h*) *Smith* v. *Hughes* (1871), L. R. Q. B. 597.

(*i*) *Tamplin* v. *James* (1880), 15 Ch. D. 215; *Turner* v. *Green*, [1895] 2 Ch. 205; but see *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266; reversed on appeal, W. N., [1903] p. 25.

(*k*) *Malins* v. *Freeman* (1838),

(B) *Misrepresentation and fraud.*—Where one party to a contract induces the other to enter into it by an untrue representation, the contract is *voidable* at the option of the party who has been misled. In certain cases, indeed, *i.e.*, where the misrepresentation goes to the root of the contract, it may have the effect of rendering it void *ab initio* (*l*). Cases of the latter kind, are, in effect, cases of relievable *mistake*, and have already been dealt with.

Misrepresentation may be either *innocent* or *fraudulent*. Innocent misrepresentation by one party entitles the other party to rescind a contract, and to recover only such damages as will compensate him for out-of-pocket loss, so as to restore him as far as possible, to his *status quo* (*m*). In a few exceptional cases, however, damages for loss of bargain may also be obtained even in the case of innocent misrepresentation ; for instance, where a person honestly represents himself as being the authorised agent of another person, when, in fact, he has no such authority (*n*), and where directors honestly, but on unreasonable grounds, make untrue statements in a company prospectus (*o*).

Where, however, a misrepresentation amounts to *fraud*, in addition to a right to rescission, the defrauded party has an "action of deceit," by which he can recover full damages for loss of bargain or other damage sustained (*p*).

The essential elements, common to both innocent and fraudulent misrepresentation are as follows. (1) There must be an *untrue* representation of *fact*, and not merely of

2 Keen, 25; *Jones* v. *Rimmer* (1880), 14 Ch. D. at p. 592; but see *May* v. *Platt*, [1900] 1 Ch. 616.

(*l*) *E.g.*, *Cundy* v. *Lindsay* (1878), L. R. 3 App. Ca. 459; *Lewis* v. *Clay* (1898), 67 L. J. Q. B. 224.

(*m*) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1; *Adam* v. *Newbigging* (1888), 13 A. C. 308; *Hart* v. *Swain* (1877), 7 Ch. D. 42.

(*n*) *Firbank* v. *Humphreys* (1886), 18 Q. B. D. 54.

(*o*) Directors' Liability Act, 1890, s. 3; Companies Act, 1900, s. 9.

(*p*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377; *Burrows* v. *Rhodes*, [1899] 1 Q. B. 816.

law, or intention, or opinion (*q*). (2) It must be a definite representation, and not mere "puffing" or general commendation of the subject matter of the contract (*r*). (3) It must be in a material particular, and calculated to act as an inducement to the contract (*s*). (4) The other party must be actually misled by it, and induced to enter into the contract in reliance upon it, and must suffer prejudice in consequence (*t*).

In cases of *fraud*, a further element is necessary, *i.e.*, the false representation must be made "(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false;" in other words, the party making the misstatement must do so without any honest belief in the truth of it. This was finally established by the House of Lords in the great case of *Derry* v. *Peek* (*u*), where the old theory of a supposed distinction between "legal" and "moral" fraud was exploded, and it was settled, that a misrepresentation honestly believed in is not fraudulent merely because the belief was based on unreasonable grounds (*x*).

In one class of cases, *i.e.*, representations as to the "character, conduct, credit, ability, trade, or dealings of any other person, to the intent that such other person may obtain credit," an action does not lie unless the representation was made in writing signed by the party to be charged (*y*). It should also be remembered, that a

(*q*) *Beattie* v. *Ebury* (1872), L. R. 7 H. L. 102; *Ex parte Burrell* (1876), 1 Ch. D. 552; *New Brunswick Rail. Co.* v. *Conybeare* (1861), 9 H. L. C. 711.

(*r*) *Scott* v. *Hanson* (1826), 1 Sim. 13; but distinguish *Smith* v. *Land Corporation* (1884), 28 Ch. D. 7.

(*s*) *Smith* v. *Chadwick* (1884), L. R. 9 App. Ca. 196.

(*t*) *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301; *Smith* v. *Chadwick*, *supra*; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392.

(*u*) *Derry* v. *Peek* (1889), L. R. 14 App. Ca. 337.

(*x*) *Angus* v. *Clifford*, [1891] 2 Ch. 449; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491.

(*y*) The Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act), s. 6; *Clydesdale*

fraudulent representation need not necessarily be made directly to the party who seeks to recover damages in respect of it, provided such party was intended to act upon it (*z*).

A misrepresentation must be carefully distinguished from a *warranty*. The latter is an agreement contemporaneous with but collateral to the main purpose of a contract, by which, in effect, one party asserts a particular fact, and expressly or impliedly undertakes to be responsible in damages if it should turn out to be untrue. The remedy for a breach of warranty is therefore damages, and not rescission of the contract. It is often difficult to determine whether a statement made by a contractor at or about the time of the contract, is a mere representation or a warranty. The question must be settled by examining the facts of each particular case (*a*).

Contracts uberrimæ fidei.—There are certain classes of contracts to which this name is applied, the common characteristic of which is, that they may be avoided on account of *non-disclosure* of a material fact. In other words, there is a positive duty imposed on each party not only to refrain from active misrepresentation, but also to communicate to the other every fact relevant to the contract which would materially affect his judgment. Such cases are exceptions to the general rule, which is, that mere *suppressio veri*, or non-disclosure of facts, does not invalidate a contract, at all events unless there is such "industrious concealment," as, in effect, to amount practically to fraudulent misrepresentation (*b*). Generally speaking, "simple reticence does not amount to legal

Bank v. *Paton*, [1896] A. C. 381; *Hirst* v. *West Riding Banking Co.*, [1901] 2 K. B. 560.

(*z*) *Scott* v. *Dixon* (1860), 29 L. J. Ex. 62; *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377; *Andrews* v. *Mockford*, [1896] 1 Q. B. 372.

(*a*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215; *Bentsen* v. *Taylor*, [1893] 2 Q. B. 274.

(*b*) *Schneider* v. *Heath* (1813), 3 Camp. 506; *Gordon* v. *Street*, [1899] 2 Q. B. 641; Fry, *Specific Performance*, 713.

"fraud, however it may be viewed by moralists" (*c*). The chief classes of contracts *uberrimæ fidei* are the following: (1) contracts of insurance in respect of life, fire, and maritime or other risks (*d*); (2) contracts to take shares in a company based upon a prospectus issued by the company, at all events if the suppression "contains a "suggestion of falsity," or is in breach of the requirements of the Companies Act, 1900 (*e*); and (3) contracts for compositions with creditors (*f*). It is sometimes said, that ordinary contracts of guarantee are also within the rule; but this does not seem in harmony with authority (*g*).

Some text book writers also place contracts for the sale of land in this class; but this also appears not to be strictly accurate, though suppression may sometimes be a reason for resisting specific performance, on the ground (probably) of *hardship* (*h*).

(c) *Duress.*—When a party is induced to enter into a contract by actual or threatened *personal* violence to himself, his wife, or child, he is said to act under *duress*, and the contract is voidable at his option (*i*). Duress in respect of goods or other property is not sufficient to avoid a contract; but where money is paid to release property *wrongfully* withheld, it may be recovered back (*k*). So also, a contract made by an agent of the party suffering the duress, in order to remove the duress from his principal, is voidable (*l*).

(*c*) CAMPBELL, L.C., in *Walters* v. *Morgan* (1861), 3 De G. F. & J. at p. 723.

(*d*) *Seaton* v. *Heath*, [1899] 1 Q. B. 782; [1900] A. C. 135; *Iowides* v. *Pender* (1874), L. R. 9 Q. B. 531; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363.

(*e*) *McKeown* v. *Boudard* (1896), 74 L. T. 712; *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273.

(*f*) *Britten* v. *Hughes* (1828), 5 Bing. 466: *per* BEST, C.J.

(*g*) *Davies* v. *London Provincial Insurance Co.* (1878), 8 Ch. D. 469; *Seaton* v. *Heath*, *supra*.

(*h*) Fry, *Specific Performance*, 402, 713; *Turner* v. *Green*, [1895] 2 Ch. 205.

(*i*) Co. Litt. 253 b; 2 Inst. 483; *Scott* v. *Sebright* (1886), 12 P. D. 21; *Cooper* v. *Crane*, [1891] P. 369.

(*k*) *Wakefield* v. *Newbon* (1844), 6 Q. B. 276.

(*l*) *Cumming* v. *Ince* (1847), 11 Q. B. 112.

(D) *Undue Influence.*—When the parties to a contract or other transaction are in such a relationship or position to each other that by force of circumstances "dominion may be exercised by one person over another," it is a general principle of law that there is a presumption of undue influence, and "the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable" (*m*).

As between persons who are *sui juris*, of sound mind and competent understanding, and not in any fiduciary or dependent relationship to each other, it is, of course, almost impossible for a case of "undue influence" to arise, unless it, in effect, amounts either to fraud or duress (*n*). But the presumption above mentioned arises in a number of cases in which one of the parties to a transaction is at some obvious and well-marked disadvantage, as compared with the other.

The chief instances are as follows: (1) contracts for the sale of reversionary interests, or other agreements made by expectant heirs upon the credit of their expectancy (*o*); (2) agreements by persons in favour of others to whom they stand in a fiduciary relation, such as parents with children, trustees with beneficiaries, solicitors with clients, guardians with wards, directors of a company with the company, and promoters of a company in the case of sales to the company (*p*); (3) agreements by persons at a disadvantage owing to their illiterateness or ignorance of business, and absence of independent advice or extreme

(*m*) SELBORNE, L.C., in *Aylesford* v. *Morris* (1873), L. R. 8 Ch. 489; COTTENHAM, L.C., in *Dent* v. *Bennett* (1838), 4 M. & Cr. 277.

(*n*) *Barnes* v. *Richards* (1902), 86 L. T. 231.

(*o*) *Chesterfield* v. *Jannsen* (1750), 1 Wh. & Tud. L. C. 289; *Brenchley* v. *Higgins* (1901), 83 L. T. 751.

(*p*) *Barron* v. *Willis*, [1900] 2 Ch. 121; *De Witte* v. *Addison* (1899), 80 L. T. 207; *Fox* v. *Mackreth* (1788), 2 Wh. & Tud. L. C. 709; *Wright* v. *Carter*, [1903] 51 W. R. 196.

necessity (*q*) ; (4) agreements by any person in favour of another, who, owing to some peculiar relationship, has special facilities for exercising dominion or influence, *e.g.*, between medical men and their patients, or persons and their spiritual, religious, and other confidential advisers (*r*).

Sub-section (9).—*Discharge of Contracts.*

The chief modes in which a contract may be discharged are the following. (1) By express agreement or release ; (2) by alteration of a written agreement ; (3) by performance ; (4) by accord and satisfaction or release ; (5) by merger ; (6) by bankruptcy ; (7) by breach of contract by the other party ; (8) to a certain extent by the statutes of limitation ; and (9) by impossibility of performance. We will consider these briefly in the order mentioned.

(1) *Express agreement for rescission.*—If both parties mutually agree to put an end to a contract which has not yet been performed on either side, the contract is effectually discharged. If, however, it has been performed by one party, the other can only be discharged if he is properly released either under seal or for some express consideration, because otherwise the promise to release would have no consideration to support it (*s*). Non-performance for a considerable lapse of time may raise an implication of an agreement to abandon the contract (*t*). Sometimes the original contract contains an express provision that in certain events, or upon certain conditions, the contract shall cease to be operative. In such a case it *ipso facto* determines upon the happening of the event, or the fulfilment of the condition. A condition of this kind may be

(*q*) *Fry* v. *Lane* (1889), 40 Ch. D. 312 ; *James* v. *Kerr* (1889), 40 Ch. D. 449 ; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437.

(*r*) *Allcard* v. *Skinner* (1887), 36 Ch. D. 145 ; *Morley* v. *Loughnan*, [1893] 1 Ch. 736 ; *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587 ; *Barnes* v. *Richards* (1902), 50 W. R. 363.

(*s*) *King* v. *Gillett* (1840), 7 M. & W. 55.

(*t*) *Bond* v. *Walford* (1886), 32 Ch. D. 238.

either positive or negative, and either *precedent* or *subsequent* (*u*). Familiar instances of conditions subsequent are to be found in the case of bonds, and in tenancy or other agreements terminable by notice.

Finally, a contract may by agreement be discharged by means of a substituted contract, which expressly or by implication supersedes it. This is sometimes called *novation*, and may arise either by a new agreement between the same parties varying the old terms, or by an agreement by which a new party is substituted for an original one.

With regard to a *release*, the term is more correctly applied to an agreement by one party, not himself in default, to waive performance by the other party, after there has already been an actionable breach by the latter. As already stated, such a release, to be effective, must either be under seal or for express consideration.

(2) *Alteration of written agreement.*—An intentional alteration of a contract in writing or under seal, in a material respect, by one party without the consent of the other, as a general rule prevents the former from enforcing the contract at all against the latter. The alteration must be material (*x*), and must not be merely accidental, or by mistake. As regards alterations in bills of exchange and promissory notes, special provisions are made by the Bills of Exchange Act, 1882, s. 64.

(3) *Performance.* — A contract must, of course, be performed strictly in accordance with its terms, but if so performed, it is obvious that it is discharged, so far at least as concerns the party who has performed it. Performance must be completed at or within the time specified, or, if none be specified, then within a reasonable time (*y*).

(*u*) *Head* v. *Tattersall* (1871), L. R. 7 Ex. 7.

(*x*) *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555; *Lowe* v. *Fox* (1887), L. R. 12 App. Ca. 206.

(*y*) *Carlton Co.* v. *Castle Mail Co.*, [1898] L. R. App. Ca. 48.

In cases, however, in which equitable relief is sought, "time is not of the essence of the contract," except where made so by express agreement or express notice, or by implication from the circumstances of the case (*z*). As regards *place*, performance must be at the agreed place if any, and if none then the debtor is bound to find the creditor, if in the jurisdiction, and offer him payment or performance (*a*).

Incidentally the subject of *tender* should be noted. Tender is an attempted payment or performance by the debtor or party liable, and if refused, and the debtor is afterwards sued for non-performance, he may plead the tender, and in cases of debts, must pay the sum tendered into court, and thereupon he becomes entitled to his costs, if the plaintiff recovers no more than what was tendered. The tender must comply with all the conditions of actual performance as regards time, place, and manner; and must be unconditional (*b*).

(4) *Accord and satisfaction or release* is really nothing more than an agreement by one party to accept something in satisfaction of his right of action for breach of contract by the other party (*c*). There must be some valuable consideration for the agreement, or else a release under seal; otherwise the agreement would be a gratuitous promise, and therefore, as we have already seen, unenforceable (*d*). In the case of an accord and satisfaction in the proper sense, there must always be a consideration, and this consideration must be executed or satisfied (*e*).

(5) *Merger.*—This occurs where a party, by taking or acquiring a security of a higher nature in legal operation

(*z*) *Lery* v. *Stogdon*, [1899] 1 Ch. 5; *Hatten* v. *Russell* (1888), 38 Ch. D. 334.

(*a*) See *Comber* v. *Leyland*, [1898] A. C. 524.

(*b*) *Finch* v. *Brook* (1834), 1 Bing. N. C. 253; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1.

(*c*) *Day* v. *McLea* (1889), 22 Q. B. D. 610.

(*d*) See above, p. 89.

(*e*) *Hall* v. *Flockton* (1851), 16 Q. B. 1039.

than the one he already possesses, merges or extinguishes his legal remedies upon the minor security or cause of action. Thus a simple contract is merged in a bond or contract by deed, and the remedy upon any contract, whether simple or by specialty, is merged in a judgment obtained in respect of it. In order that merger may take place, the two securities or causes of action must be substantially identical and co-extensive, and the parties must be the same (*f*).

(6) *Bankruptcy.*—After a receiving order is made against a debtor, no creditor has "any remedy against the property or person of the debtor," or may "commence any action or other legal proceeding, unless with the leave of the court" (Bankruptcy Act, 1883, s. 9 (1)). But a secured creditor may realise or otherwise deal with his security. When a bankrupt has obtained an "order of discharge," it releases him from all debts provable in bankruptcy except debts on recognisance, debts chargeable at the suit of the Crown or the public revenue, or on bail bonds, and debts or liabilities incurred by means of any fraud or fraudulent breach of trust (Bankruptcy Act, 1883, s. 28), and except liability under any judgment in an action for seduction, or under an affiliation order, or as a co-respondent in a matrimonial cause (Bankruptcy Act, 1890, s. 10). This subject is more fully dealt with elsewhere in this work (*g*).

(7) *Breach of contract.*—Breach of contract by one party does not necessarily discharge the other. It only does so at the latter's option, *first*, where the breach occurs either before or after performance was due, and consists in some act which altogether disables the defaulting party from performing his promise, *e.g.*, where A. promises to

(*f*) *Commissioners of Stamps* v. *Hope*, [1891] A. C. 476; *McLeod* v. *Power*, [1898] 2 Ch. 295.

(*g*) See *post*, bk. II. pt. II. ch. VI.

marry B. and subsequently marries C. (*h*); *secondly*, where one party expressly and unequivocally renounces the contract, and notifies his intention not to perform it (*i*); *and thirdly*, where the duty of one party to perform his part of a contract is expressly or impliedly conditional on the other performing his, and such other makes default in doing so, *e.g.*, on a sale of goods, payment by the buyer and delivery by the seller are conditional on each other (Sale of Goods Act, 1893, s. 28).

(8) *Statutes of limitation.*—Generally speaking, actions in respect of simple contracts are barred if not commenced within six years after the right of action first accrued (Limitation Act, 1623, s. 3). Similarly, actions in respect of contracts under seal are barred by twenty years limitation (Civil Procedure Act, 1833, s. 3). Time may be prevented from running by reason of certain disabilities, such as infancy and insanity, and also by part payment or written acknowledgment by the debtor. The statutes, it should be noted, only bar the *remedy*, and do not, as a general rule, extinguish the *right*; and therefore the right may sometimes be enforced, indirectly, in various ways, *e.g.*, by realisation of a lien or mortgage securing the debt; by an executor creditor exercising his right of retainer; or by the creditor appropriating to a barred debt an unappropriated payment made by the debtor (*k*).

(9) *Impossibility of performance.*—As a general rule, a contract which is not absolutely and physically impossible of performance when it is made, is not discharged merely because it subsequently becomes impossible (*l*). But there

(*h*) *Short* v. *Stone* (1846), 8 Q. B. 358; *O'Neill* v. *Armstrong*, [1895] 2 Q. B. 70.

(*i*) *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; *Rhymney Railway* v. *Brecon, etc. Railway* (1900), 83 L. T. 111.

(*k*) *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161; *Friend* v. *Young*, [1897] 2 Ch. 421.

(*l*) *Paradine* v. *Jane* (1646), Aleyn, 26.

are certain exceptions to this rule, of which the following are the most important: (1) where a contract becomes impossible of performance by a change of English law (*m*); (2) where a contract is for personal services, and performance is prevented by the personal incapacity of the party, owing to death, illness, or otherwise (*n*); (3) where the performance of the contract is dependent on the continued existence of a specific thing, which is accidentally destroyed (*o*); and (4) where the impossibility is caused by the act of one of the parties to the contract, the other is, as we have already seen, discharged (*p*).

Sub-section (10).—*Construction of Contracts.*

Questions frequently arise as to the exact meaning of the words of a contract. It is for the court to interpret such words in each particular case; but certain general rules of construction have gradually been established, which apply to all contracts. The primary thing to be considered is, what was the true *intention* of the parties; and in order to ascertain this intention the court will carefully scrutinise the exact terms of the contract. If such terms are quite clear and unambiguous, the court will not go outside them, notwithstanding that it may be alleged that the intention of the parties was otherwise, except, of course, in cases where the parties may be on proper grounds entitled to rectification of a written contract, as not expressing the actual agreement.

The leading rule of construction, therefore, is "that the "grammatical and ordinary sense of the words is to be "adhered to, unless that would lead to some absurdity or "some repugnancy or inconsistency with the rest of the "instrument, in which case the grammatical and ordinary

(*m*) *Bailey* v. *De Crespigny* (1869), L. R. 4 Q. B. 180.

(*n*) *Robinson* v. *Davison* (1871), L. R. 6 Ex. 269.

(*o*) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; *Nickoll and Knight* v. *Ashton & Co.*, [1901] 2 K. B. 126.

(*p*) *O'Neill* v. *Armstrong*, [1895] 2 Q. B. 418; *The Blairmore*, [1898] A. C. 593.

"sense of the words may be modified so as to avoid that "absurdity or inconsistency, but no further" (*q*). Regard must be had to the *whole* agreement. Particular expressions must be construed in the light of their context (*r*).

Another rule is, that general words must be construed in application to the particular purpose for which they are used. Hence, general words following an enumeration of specific things are usually construed as restricted to things of the same kind (*ejusdem generis*) as those specifically enumerated (*s*). Again, the construction must as far as possible be *favourable*, *i.e.*, such as to support the validity of the contract, on the principle "*ut res magis valeat quam pereat*" (*t*). On somewhat the same principle, the construction must be *reasonable*, and not necessarily in all cases *literal* (*u*). Finally, there is a rule, only applicable if all other rules fail, that an ambiguity of expression must be construed rather against the party using it than against the other party; according to the maxim, "*verba fortius accipiuntur contra proferentem*" (*x*).

Sub-section (11).—*Remedies for Breach of Contract.*

(A) *Action for damages.*—This is the ordinary common law remedy. The principle upon which it is based is, that if one party breaks a contract he ought to make pecuniary compensation to the other party to such an extent that the latter may, "so far as money can do it, be placed in "the same situation as if the contract had been per-"formed" (*y*). The measure of damages is therefore, in general, the value of the performance to the plaintiff, and

(*q*) Lord WENSLEYDALE in *Grey* v. *Pearson* (1857), 6 H. L. C. 61; *McCowan* v. *Baine*, [1891] A. C. 401.

(*r*) *Monypenny* v. *Monypenny* (1860), 9 H. L. C. 114.

(*s*) *Thames Insurance* v. *Hamilton* (1887), L. R. 12 App. Ca. 484.

(*t*) *Roe* v. *Tranmarr* (1758), Willes, 682.

(*u*) *Rawlinson* v. *Clarke* (1845), 14 M. & W. 187.

(*x*) *Rodger* v. *Comptoir d'Escompte* (1869), L. R. 2 P. C. 406.

(*y*) PARKE, B., in *Robinson* v. *Harman* (1847), 1 Exch. 855; *Michael* v. *Hart*, [1902] 1 K. B. 482.

not what it would have cost the defendant to perform the contract (*z*). The presumption, in all cases, is against the wrongdoer. "Every reasonable presumption may be "made as to the benefit which the other party might "have obtained by the *bonâ fide* performance of the "agreement" (*a*). At the same time, generally speaking, damages are restricted to the *proximate* consequences of the breach of contract. The rules on this point are commonly referred to as "the rules in *Hadley* v. "*Baxendale*" (*b*), which may be regarded as the leading case on the subject, though the principles laid down in it have been elucidated in many more important recent decisions. The general rule was thus expressed in the leading case: "The damages in respect of a contract "should be either such as fairly and reasonably may be "considered as arising *naturally*, that is, according to the "usual course of things, from such breach of contract; or "such as may reasonably be supposed to have been in the "contemplation of both parties at the time they made "the contract, as the probable result of such breach" (*c*). It follows that damages immediately and directly arising from the breach are always recoverable (*d*). But *special* damages, arising from some special circumstances peculiar to the case, are not recoverable unless the party who is sought to be made liable had, at the time of contracting, notice of, and expressly or implicitly contracted on the basis of, such special circumstances. "In order that the "notice may have any effect, it must be given under such "circumstances as that an actual contract arises on the "part of the defendant to bear the exceptional loss" (*e*).

(B) *Action for specific performance.*—This is an equitable remedy; but, under the Judicature Act, 1873, s. 24,

(*z*) *Conquest* v. *Ebbetts*, [1896] A. C. 490.

(*a*) Lord SELBORNE, L.C., in *Wilson* v. *Northampton Rail. Co.* (1874), L. R. 9 Ch. 286.

(*b*) (1854), 9 Exch. 341.

(*c*) *Ibid.*

(*d*) *Ashworth* v. *Wells* (1898), 78 L. T. 136; *MacMahon* v. *Field* (1881), 7 Q. B. D. 591.

(*e*) *Horne* v. *Midland Rail. Co.* (1873), L. R. 8 C. P. 131; *Agius* v. *Great Western Coll. Co.*, [1899] 1 Q. B. 413.

can now be given in all divisions of the High Court. The remedy is still, however, only available on equitable principles, and is not therefore granted where the ordinary remedy by action for damages is available and adequate. For instance, specific performance will not be ordered of a contract to lend money (*f*) or for personal services (*g*) or of any contract of which, on the ground of hardship, uncertainty in ability to enforce it, or otherwise, the Court of Chancery would not formerly have decreed specific performance (*h*). With regard to contracts for the sale of goods, the power to grant specific performance is expressly conferred by the Sale of Goods Act, 1893, s. 52; but the jurisdiction is exercised only in exceptional cases.

(c) *Injunction.*—Where a contract involves a negative obligation, the court will, in a proper case, restrain a breach of it by an injunction, violation of which will expose the party to committal for contempt of court. An injunction will be granted where the contract contains a negative stipulation in *express* terms (*i*), and apparently now also where the contract, although affirmative in form, is negative in substance (*k*).

(d) *Other remedies.* — There are various other subsidiary remedies applicable to special classes of contracts, *e.g.*, the right of a seller of goods to re-sell and to stop *in transitu*, and the right of *lien* which is given to sellers, carriers, innkeepers, etc. These are dealt with elsewhere in this work.

(*f*) *South African Territories* v. *Wallington*, [1898] A. C. 308.

(*g*) *Ryan* v. *Mutual Tontine Association*, [1893] 1 Ch. 116.

(*h*) *Hope* v. *Walter*, [1900] 1 Ch. 257; *Wheatley* v. *Westminster Coal Co.* (1870), L. R. 9 Eq. 538.

(*i*) *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416; *Lumley* v. *Wagner* (1851), 1 D. M. & G. 604.

(*k*) *Metropolitan Electric Supply* v. *Ginder*, [1901] 2 Ch. 799; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37.

CHAPTER V.—SECTION II.

THE CONTRACT OF AGENCY.

General nature and modes of formation.—The importance of the contract of agency lies in the fact that it is ancillary to every other class of contract. Any person may enter into any kind of contract by means of an agent acting with his authority; and the effect is, speaking generally, precisely the same as if he had personally been a party to the agreement.

In order to be valid as between the principal and the agent, the contract for the agency must conform to the ordinary rules applicable to all other contracts. No particular form is necessary. But an authority to an agent to execute a deed must itself be given by a deed, which is commonly called a *power of attorney*. Agency is usually created by express agreement; but it may also arise by implication from the circumstances and conduct of the parties.

For instance, if one person sends goods to an auctioneer or factor, whose business it is to sell goods, he is presumed to authorise a sale of them (*a*).

Agency is sometimes implied by law from the relation of the parties, as in the cases of husband and wife (*b*), and partners (*c*). It may also be presumed from the necessity of the occasion, as in the case of the master of a ship, who has implied authority to pledge the shipowner's credit

(*a*) *Pole* v. *Leask* (1864), 33 L. J. Ch. 155; *Henderson* v. *Williams*, [1895] 1 Q. B. 521.

(*b*) See above, p. 72.

(*c*) See *post*, ch. 5, sect. 6.

for the necessary means to prosecute the voyage (*d*). Although a person who purports to contract as agent for a principal, without actual authority, cannot bind the principal without his consent, yet the principal may, by a subsequent *ratification*, become bound by and entitled to the benefit of the contract. Such a ratification dates back to the original making of the contract, and its effect is precisely the same as if the agent had been authorised to contract originally, in accordance with the principle "*omnis ratihabitio retrotrahitur ac mandato priori æquiparatur*" (*e*). In order, however, that a ratification may be effectual, the following conditions must concur, *i.e.*, (1) the agent must contract as agent for a principal who is in contemplation, and in actual existence, at the time of the contract (*f*); (2) the contract must be such as the principal was at the time legally capable of entering into (*g*); (3) the principal must, at the time of ratification, have full knowledge of all material facts relating to the contract ratified, or else he must intend the ratification to take effect whatever the facts were, and in spite of his ignorance as to them (*h*).

Kinds of agents.—Agents may be divided into two principal classes: (1) *general* agents and (2) *particular* or *special* agents. A general agent is one appointed for a general class of acts, or to fill an employment or position involving transactions of various kinds within the general scope of a certain business, *e.g.*, the manager of a shop or factory, the superintendent of a railway, or the managing director of a company, etc. A particular or special agent

(*d*) *The Heinrich Bjorn* (1886), L. R. 11 App. Ca. 270; *The Sarona*, [1900] P. 252; and see, generally, *Grilliam* v. *Twist*, [1895] 2 Q. B. 84.

(*e*) *Bolton* v. *Lambert* (1889), 41 Ch. D. 295; *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348; *In re Tiedemann*, [1899] 2 Q. B. 66.

(*f*) *Keighley* v. *Durant*, [1901] A. C. 240; *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174; *Brook* v. *Hook* (1871), L. R. 6 Ex. 89.

(*g*) *Ex parte Badman and Bosanquet* (1890), 45 Ch. D. 16.

(*h*) *Marsh* v. *Joseph*, [1897] 1 Ch. 213; *Banque Jacques Cartier* v. *Banque d'Epargne* (1888), L. R. 13 App. Ca. 111.

on the other hand, is one appointed for a particular occasion or purpose only. The important difference between the two cases is with regard to the position of third persons with whom they deal. Such third persons are only concerned with the *apparent* and not the *actual* authority of an agent. Therefore if a general agent, purporting to act on behalf of his principal, enters into a contract within the *apparent* scope of his employment, his principal is bound by the contract, notwithstanding any express limitation of the agent's authority, which is unknown to the third party with whom he has contracted (*i*). But, in the case of a particular agent, a third party contracting with him does so at his own peril, unless he previously ascertains the exact extent of the agent's authority (*k*).

There are certain kinds of general agents to whom distinctive names are applied. The following are the chief instances. *Factors*, who are agents to whom goods are entrusted, with a discretionary power of sale. Special provisions with regard to them are contained in the Factors Act, 1889 (*l*). *Brokers*, who are agents employed to buy and sell goods or other property, but not, as in the case of factors, having possession of the goods. Their authority is merely to negotiate and superintend the making of a bargain between two other persons (*m*). A broker employed in a particular trade or market has implied authority to contract according to the usages of the trade or place ; *e.g.*, a stockbroker is implicitly authorised to act according to the rules of the Stock Exchange (*n*). *Commission agents*, who are agents employed to buy or

(*i*) *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346 ; *Reid* v. *Rigby*, [1894] 2 Q. B. 40 ; *Wright* v. *Glyn*, [1902] 1 K. B. 745.

(*k*) *Brady* v. *Todd* (1861), 9 C. B. (N.S.) 592 ; *Bryant* v. *La Banque du Peuple*, [1893] A. C. 170 ; *Jacobs* v. *Morris*, [1902] 1 Ch. 816.

(*l*) See p. 114 ; *Hastings* v. *Pearson*, [1893] 1 Q. B. 62.

(*m*) Blackburn, *Contract of Sale*, p. 81.

(*n*) *Levitt* v. *Hamblet*, [1901] 2 K. B. 53 ; *Sutton* v. *Tatham* (1839), 10 A. & E. 27.

sell goods as principals in one country or market for some person in another country or market, in consideration of a commission for their services (*o*). *Del credere agents*, who are agents for the purpose of a sale, and expressly or implicitly warrant or undertake for the due performance of the contracts procured through their agency. Their undertaking is not a guarantee in the strict sense, and therefore need not be in writing under the Statute of Frauds, s. 4 (*p*). *Auctioneers*, who are agents with authority to sell by public auction goods in their possession. They can sell in their own name, but are not authorised to give a warranty of the goods (*q*). They are entitled to an indemnity from the owner of the goods against the consequences of acting upon his authority ; and they have a lien upon the goods sold for their charges and commission. Other familiar instances of general agents are *house* and *estate agents* (*r*), *ship brokers*, *insurance brokers*, *ship-masters*, and *partners* (who are agents of the firm).

Legal effect of contracts made by agents.—Where an agent contracts with a third person, the precise legal effect differs according to circumstances. The following three different classes of cases may exist. First, *the agent may contract as such for a named principal.* In this case the agent is a mere conduit pipe, and, having acted as such, he immediately drops out of the transaction, the principal being solely liable on, and capable of enforcing, the contract (*s*). But there is an exception to this rule where the agent buys goods in England for a foreign principal, in which case, by mercantile custom, the agent is usually personally liable on the contract (*t*). Similarly, an agent who contracts by a deed, in which his principal is not

(*o*) *Ireland* v. *Livingston* (1871), L. R. 5 H. L. 407.

(*p*) *Couturier* v. *Hastie* (1852), 8 Exch. 40.

(*q*) *Woolfe* v. *Horne* (1877), 2 Q. B. D. 355.

(*r*) See *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267.

(*s*) *Ellis* v. *Goulton*, [1893] 1 Q. B. 350.

(*t*) *Hutton* v. *Bulloch* (1874), L. R. 9 Q. B. 572; *Malcolm* v. *Hoyle* (1894), 63 L. J. Q. B. 1.

expressly named as a party, incurs personal responsibility (*u*). And if an agent signs a bill of exchange in his own name, and not in the name of his principal, the latter cannot be made liable on the bill (*x*). Second, *the agent may contract for a principal whose existence is disclosed, but not his name.* In this case, if the agent expressly contracts as such, and not so as to pledge his own personal credit, the principal, and not he, is the one to sue and be sued on the contract. But, on the other hand, if there is nothing on the face of the contract to exonerate the agent, he is *primâ facie* liable, and the third party can elect whether to treat him or the principal as the person responsible upon the contract (*y*). Evidence of custom may, however, in the former case, be given to show that the agent is the person intended to be bound (*z*). Third, *the agent may contract in his own name, without disclosing either the name or existence of the principal.* In this case the other party to the contract has the option, within a reasonable time after ascertaining the identity of the principal, to elect to treat either the agent or the principal as the person with whom he contracted (*a*). But, having once exercised his option by some unequivocal act, he must abide by it. And if the third party has, by his conduct or representations, induced the principal to prejudice himself, under the belief that the third party has given credit in the matter to the agent personally, he cannot afterwards sue the principal (*b*).

In any of the above cases in which an agent contracts in his own name for an undisclosed principal, and the

(*u*) *In re Pickering* (1871), L. R. 6 Ch. App. 525.

(*x*) Bills of Exchange Act, 1882, ss. 23, 26, 91 (1).

(*y*) *Thomson* v. *Davenport* (1829), 9 B. & C. 48; *Paice* v. *Walker* (1870), L. R. 5 Ex. 173.

(*z*) *Pike* v. *Ongley* (1887), 18 Q. B. D. 708; *Borrow* v. *Dyster* (1884), 13 Q. B. D. 635.

(*a*) *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346; *Paterson* v. *Gandasequi* (1812), 15 East, 62.

(*b*) *Heald* v. *Kenworthy* (1855), 10 Exch. 745; *Irvine* v. *Watson* (1880), 5 Q. B. D. 414; *Davison* v. *Donaldson* (1882), 9 Q. B. D. 623.

principal afterwards sues to enforce the contract against the third party, the latter may set off a debt due from the agent to himself (*c*). This is on the ground that "the "agent has been permitted by the principal to hold him- "self out as the principal, and that the person dealing "with the agent has believed that the agent was the "principal, and has acted on that belief" (*d*). This principle applies to factors and similar agents, but cannot readily apply to brokers (*e*).

Liability of an unauthorised agent.—Even if a person purports expressly to contract as agent for a named principal or otherwise, he is personally liable if either he had no actual authority at all, or exceeded his authority (*f*). *A fortiori* he is liable if the alleged principal was not in existence (*g*). In all such cases the agent is implied by law to have warranted that he had authority, and is therefore liable in damages, whether he acted fraudulently or innocently in the matter (*h*). This rule does not, however, apply to a contract made by a public servant as agent for the Crown (*i*).

Duties of an agent.—As between himself and his principal, an agent must strictly adhere to his instructions and not exceed the authority given to him. He must use due diligence in carrying out his agency. In accordance with the maxim "*delegatus non potest delegare*," he must not delegate his authority, at all events except so far as to obtain merely ministerial assistance, or to employ qualified sub-agents, in cases where the nature of the business

(*c*) *George* v. *Clagett* (1797), 7 T. R. 359.

(*d*) *Cooke* v. *Eshelby* (1887), L. R. 12 App. Ca. 271.

(*e*) *Montagu* v. *Forwood*, [1893] 2 Q. B. 350; *Fish* v. *Kempton* (1849), 7 C. B. 687.

(*f*) *Collen* v. *Wright* (1857), 8 E. & B. 647; *Oliver* v. *Bank of England*, [1902] 1 Ch. 610; affirmed in House of Lords, *sub nom. Starkey* v. *Bank of England*, W. N. 1903, p. 52; *Halbot* v. *Lens*, [1901] 1 Ch. 344.

(*g*) *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174.

(*h*) *Firbank* v. *Humphreys* (1886), 18 Q. B. D. 54.

(*i*) *Dunn* v. *Macdonald*, [1897] 1 Q. B. 401, 555.

implies an authority to do so (*k*). The right to delegate in cases of urgent necessity may also sometimes arise, but is confined to certain well-recognised cases, such as the master of a ship (*l*). He must fully account to his principal for the subject-matter and profits of his agency; and in particular must not make any *secret profit*, whether in the shape of a bribe, or surreptitious "commission," or otherwise (*m*). This, of course, applies to directors of a company, who are, in law, agents of the company (*n*).

Rights of an agent against his principal.—An agent is entitled to the commission or remuneration, if any, agreed on, and he has an implied right to be fully reimbursed and indemnified by the principal in respect of all reasonable expenses and liabilities properly incurred in carrying out the agency (*o*). This does not, of course, apply where by express statute the right is excluded, *e.g.*, by the Gaming Act, 1892 (*p*). In certain cases, also, an agent may have a *lien* upon the subject-matter or proceeds of the agency for his commission and expenses, *e.g.*, in the case of auctioneers, brokers, factors, masters of ships, etc. (*q*).

Termination of agency.—The authority of an agent is, in general, revocable by the principal at any time before it is executed. But if the authority is "coupled with an interest," *i.e.*, given for the purpose of securing some benefit to the agent, it is irrevocable (*r*). In any case, a

(*k*) *Bell* v. *Balls*, [1897] 1 Ch. 663; *Brown* v. *Tombs*, [1891] 1 Q. B. 253; *De Bussche* v. *Alt* (1878), 8 Ch. D. 310.

(*l*) *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84.

(*m*) *Skelton* v. *Wood* (1895), 71 L. T. 616; *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369; *Salford Corporation* v. *Lever*, [1891] 1 Q. B. 168; *Grant* v. *Gold Exploration Syndicate*, [1900] 1 Q. B. 233; *Erskine* v. *Sachs*, [1901] 2 K. B. 504.

(*n*) *Archer's Case*, [1892] 1 Ch. 322.

(*o*) *Betts* v. *Gibbins* (1834), 2 A. & E. 57; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388.

(*p*) *Levy* v. *Warburton* (1901), 70 L. J. K. B. 708.

(*q*) *Webb* v. *Smith* (1885), 30 Ch. D. 192; Merchant Shipping Act, 1894, s. 167; *Re London and Globe Corporation*, [1902] 2 Ch. 416.

(*r*) *Smart* v. *Sandars* (1848), 5 C. B. 895; *In re Hannan's, etc. Co.*, [1896] 2 Ch. 643.

revocation of the authority of a person who has been clearly held out by the principal as an agent for him, is not effective as against third persons afterwards dealing with the agent without notice of the revocation (*s*). Special provisions as to making *powers of attorney* irrevocable are contained in the Conveyancing Act, 1881, s. 47, and the Conveyancing Act, 1882, ss. 8 and 9. The authority of an agent is also *primâ facie* revoked by the death or bankruptcy of the principal (*t*).

(*s*) *Drew* v. *Nunn* (1879), 4 Q. B. D. 661.

(*t*) *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43; *Ex parte Snowball* (1872), L. R. 7 Ch. 534.

CHAPTER V.—SECTION III.

THE CONTRACT OF SALE.

THE contract of sale was defined by the old writers as a contract whereby the property in goods is transmuted from one man to another for a price (*a*). For if the commutation be goods for goods, it is more properly an *exchange*; but if it be a transferring of goods for money, it is called a *sale*, which is a method of exchange introduced for the convenience of mankind (*b*).

What is a sale?—The law of sale of goods is now regulated and codified by the Sale of Goods Act, 1893. By that Act (sect. 1) *a contract of sale* of goods is defined as "a contract whereby the seller transfers or agrees to "transfer the property in goods to the buyer for a "money consideration called the price." For it is to be understood that every contract of sale implies a bargain or mutual agreement between the parties as to terms; and if the vendor says the price of the goods is £4, and the vendee says he will give £4, the bargain is struck.

The term "goods" as defined by the Act (sect. 62) comprises "all chattels personal other than things in "action and money," including "emblements, industrial "growing crops, and things attached to or forming part "of the land, which are agreed to be severed before sale, "or under the contract of sale."

When the property vests in purchaser.—The rules as to when the property in the goods sold is transferred to the buyer are stated in ss. 16 to 20 of the Act. They may be shortly summarized as follows: (a) The property in

(*a*) Noy. *Max.* 42. (*b*) Gen. ch. XXIII. v. 16.

unascertained goods does not pass to the buyer until the goods are ascertained. Goods in bulk (*e.g.*, so many hundredweight of sugar) are for this purpose "ascertained," if and when they (*i.e.*, the agreed quantity) have been set apart and unconditionally appropriated to the buyer. (b) The property in specific or ascertained goods passes when the parties agree it shall pass ; but in the absence of special agreement the following rules govern. (c) If specific goods ready for delivery are sold under an unconditional contract, the property vests in the purchaser as soon as the contract is made ; but if something remains to be done to such goods to render them deliverable, the property does not pass until this is done and the buyer has notice of the fact. (d) Where specific goods are sold in a deliverable state, but subject to their being weighed, measured, or tested for the purpose of ascertaining the price (*e.g.*, if A. sells to B. all the sugar of unascertained amount in a particular warehouse at so much per hundredweight), the property does not pass until the price is so ascertained, and the buyer has notice of it. (e) If goods are delivered "on sale or return" the property passes to the buyer as soon as he either signifies his acceptance, or retains the goods without notice of rejection beyond the time limited for their return, or for an unreasonable time. (f) If the seller in any case, notwithstanding delivery, reserves the right of disposal of the goods until some condition is fulfilled, the property does not pass until such condition is in fact fulfilled. The question of when the property vests in the purchaser is very material, as determining who shall bear the loss in case the goods are accidentally destroyed after the contract of sale, but before delivery to the purchaser.

It must be borne in mind, however, that there is a great distinction between the vesting of the property in goods and the vesting of the right to the possession thereof ; for in the case of a sale of specific and finished goods for ready money, the purchaser cannot take the goods until

he pays or tenders the whole price agreed on (*c*). But if he tenders the money to the vendor, and the latter refuses it, the purchaser may have an action against the vendor for detaining the goods.

Form of contract.—By section 4 of the Sale of Goods Act, 1893, re-enacting, with slight alterations, section 17 of the Statute of Frauds (29 Car. 2, c. 3), it is provided that no contract for the sale of any goods *of the value of* 10*l. or upwards* shall be enforceable by action, unless the buyer shall either (1) accept part of the goods, and actually receive the same (*d*) ; or (2) give something in earnest to bind the bargain, or in part payment (*e*) ; or (3) unless some memorandum or note in writing of the bargain be made and signed by the party to be charged, or his agent in that behalf. And it has been further specifically provided, by section 4 (2) of the Sale of Goods Act, 1893, repealing but re-enacting the like provision contained in the 7th section of the Statute of Frauds Amendment Act, 1828 ("Lord Tenterden's Act"), that the requisites above stated shall apply to every contract for the sale of goods of the value aforesaid, notwithstanding that the goods may be intended to be delivered at some future time, or may not, at the time of the contract, be actually made, procured, or provided, or fit or ready for delivery, or that some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. And we will here observe, that where the contracting parties rely on the memorandum or note in writing, such memorandum or note must be of the same kind as required in the case of the like memorandum or note under the 4th section of the Statute of Frauds, and must contain all the terms of the contract (*f*). On a sale of goods by auction, the auctioneer may in general sign as agent for the buyer

(*c*) Act, 1893, s. 28.

(*d*) *Taylor* v. *Smith*, [1893] 2 Q. B 65 ; *Abbott* v. *Wolsey*, [1895] 2 Q. B. 97.

(*e*) *Walker* v. *Nussey* (1847), 16 M. & W. 302.

(*f*) See above, p. 66.

as well as for the seller, where such sales are (as they usually are) evidenced by a memorandum or note in writing. And upon such sales, just as upon the sale of land by auction (*g*), unless the right to bid is reserved, it is fraudulent on the seller's part to employ anyone to bid on his behalf; but under such reserved right, the seller, or any one agent on his behalf, may now bid at the auction (*h*).

Lien and stoppage in transitu.—If the vendor of goods transmit them to the vendee, without receiving payment of the price, and afterwards becomes apprised that the vendee is insolvent, the law allows the vendor the privilege of *stoppage in transitu*; that is to say, the law entitles the vendor, *while the goods are still in their transit, and not yet delivered to the vendee*, to reclaim them, and to determine (or at least to suspend the performance of) the contract of sale (*i*). The question as to when exactly goods are deemed to be *in transitu* depends on the circumstances of each case. The chief rules on the point are laid down in s. 45 of the Act of 1893. The right of stoppage will not be affected by the vendor having consigned the goods to the vendee under a bill of lading (*k*); but if the vendee or consignee under such a bill has indorsed the bill to a third party for valuable consideration, and the indorsee has received the bill without notice that the consignee was insolvent and the consignor unpaid, his claim, as assignee of the bill of lading, is paramount to the consignor's right of stoppage *in transitu* (*l*). Such an indorsement must (in order to have that effect) be absolute; and if it be by way of pledge or charge only, the right of the unpaid vendor is not defeated thereby,

(*g*) Sale of Land by Auction Act, 1867.

(*h*) Sale of Goods Act, 1893, s. 58.

(*i*) Act of 1893, s. 44; *Wentworth* v. *Outhwaite* (1842), 10 M. & W. 436.

(*k*) The Bills of Lading Act, 1855, s. 2.

(*l*) Act 1893, s. 47; *Lickbarrow* v. *Mason* (1788), 2 T. R. 63.

but (subject to the pledge or charge) remains (*m*). And generally the exercise by the vendor of his right of stoppage *in transitu* does not operate of itself to rescind the contract, unless the seller resells the goods; as, in certain cases, he is entitled to do (*n*).

Transfer of title.—Though, in general, it is only from the owner that any property in goods can be derived, yet goods may, in certain cases, be effectually transferred to a purchaser by one who has himself no title to them; for a sale in *market overt* is not only good between the parties, but also is binding on all those that have any right of property in the thing sold therein (*o*). ["*Market overt*," in the country, is a market held on the special days provided as market days, for particular towns, by charter or prescription; but in the city of London every day, except Sunday, is a market day (*p*). The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt; but in London every shop in which goods are exposed publicly for sale is a market overt, though only for such things as the owner ordinarily trades in there (*q*). But to the general rule as to the binding effect of a sale in market overt, there are certain exceptions,—that is to say: First, if the goods be *Crown* property, such a sale will not bind the Crown. Secondly, if the sale is not *bonâ fide*,—*e.g.*, if the buyer knows the property not to be in the seller; or if he knows the seller to be an infant or under other disability; or if the sale be not originally and wholly made in the market, or not at the usual hours (*r*),—in any of these cases, the sale is not binding. Thirdly, if the man buy his own goods in a market, the sale shall not bind him, unless the property

(*m*) Act 1893, s. 47; *Sewell* v. *Burdick* (1885), L. R. 10 App. Ca. 74.

(*n*) Act 1893, s. 48.

(*o*) *Ibid.*, s. 22.

(*p*) *Taylor* v. *Chambers* (1605), Cro. Jac. 68.

(*q*) 5 Rep. 83; *Hargreave* v. *Spink*, [1892] 1 Q. B. 25.

(*r*) 2 Inst. 713, 714.

[had been previously altered by a former sale (*s*); and notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, should come again into possession of the goods, the original owner may take them when found in his hands who was guilty of the first breach of justice (*t*). By these wise regulations, the law has secured the right of the proprietor in personal chattels from being improperly divested; so far at least as is consistent with that other necessary policy, that *bonâ fide* purchasers in an open and regular manner shall not be afterwards put to difficulties by reason of the previous knavery of the seller.]

Fourthly, where there has been a *bonâ fide* purchase in market overt, if the property so bought was *stolen* from the owner, the true owner may prosecute the offender to conviction, and thereupon the property in the goods will re-vest in him, and he may obtain an order of restitution, —to which order he will be entitled notwithstanding the intervening sale in market overt (*u*), the *bonâ fide* purchaser in such a case receiving only such (if any) compensation, out of the property of the thief, as the convicting judge may direct (*x*). And if my goods are stolen or in any other way wrongfully taken from me and sold *out* of market overt, my property therein is not altered, and I may re-take them wherever I find them, even from an innocent vendee, except where the acquisition from me was voidable only, and a *bonâ fide* purchaser took the goods before I elected to avoid the transaction (*y*). It has been enacted by the Pawnbrokers Act, 1872, that a person suspecting any article of which he is the owner to have been unlawfully pawned, and on oath satisfying a justice that there is good cause and probable ground for

(*s*) Perk. s. 93.

(*t*) 2 Inst. 713.

(*u*) *Bentley* v. *Vilmont* (1887), L. R. 12 App. Ca. 471; s. 24 of the Act of 1893.

(*x*) Section 9.

(*y*) *Farquharson* v. *King*, [1902] A. C. 325; *Cundy* v. *Lindsay* (1878), L. R. 3 App. Ca. 459; s. 23 of the Act of 1893.

such suspicion, may obtain a warrant for searching the house of the pawnbroker ; and if on such search the goods shall be found, and the property of the claimant proved, he shall be entitled to have them restored (*z*). Also, with regard to *horses*, a purchaser gains no property in one which has been stolen, unless he not only buys it in a fair or market overt, but also in accordance with the directions of the statutes 2 & 3 P. & M. c. 7, and 31 Eliz. c. 12 (*a*) ; by which statutes it was [enacted, that (in effect) a horse so purchased must have been openly exposed in the time of such fair or market for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable ; and that even such sale shall not take away the property of the owner, if within six months after the horse was stolen he puts in his claim before some magistrate in the place where the horse shall be found, and within forty days more after such claim shall prove his property, by the oath of two witnesses, and shall tender to the person in possession such price as the latter *bonâ fide* paid for the horse in market overt (*b*).] And incidentally it may be observed that, with regard to the shares and stocks of *joint stock banking companies*, it has been enacted, by the Banking Companies' (Shares) Act, 1867 (commonly called Leeman's Act), that all contracts, agreements, and tokens for the sale or transfer of such shares or stocks shall be null and void, unless the same shall set forth and designate in writing the distinguishing *number or numbers* of such shares or stocks (*c*),—a provision, however, which is generally ignored on the Stock Exchange, and which appears, at the most, to be applicable only to the sale of

(*z*) Section 36 of the Act of 1872; *Singer Manufacturing Co.* v. *Clark* (1880), 5 Ex. D. 37.

(*a*) 2 Inst. 713 ; Act, 1893, s. 22.

(*b*) Com. Dig. *Market* (E) ; *Lee* v. *Bayes* (1856), 18 C. B. 599.

(*c*) *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460 ; *Loring* v. *Davis* (1886), 32 Ch. D. 625.

shares or stocks of which the vendor is not (at the time of the sale) possessed (*d*).

Implied *warranties and conditions.*—Upon the question, whether, upon the sale of personal chattels, the seller warrants his own title to the goods sold, it is to be remarked, that if a person sell goods and chattels as his own, and the price be paid, and the title prove deficient, he may, in general, be compelled to refund the money to the purchaser, on the ground of a *total* failure of the consideration; and a warranty of *title* is (and ever hath been) implied on every sale of goods, unless the circumstances of the sale are such as fairly to exclude the implication (*e*). The law as to this is now defined by the Sale of Goods Act, 1893, s. 12, which provides that, in the absence of contrary intention, there is an implied *condition* that the seller has a right to sell, and implied *warranties* for quiet possession and freedom from undisclosed incumbrances. But with regard to the quality or fitness of the wares purchased, the vendor is not (according to our law) bound to answer, unless he expressly warrants them to be sound (*f*), or unless he knew them to be faulty, and yet represented them to be sound or used any art to disguise them (*g*)—the maxim in such cases being, in general, *caveat emptor*: and the application of this maxim is not affected by the circumstance, that the price was such as is usually given for a sound commodity. But upon a contract for the purchase of goods of any particular denomination, where the purchaser has no opportunity of inspecting them before they are delivered, there is, on the part of the seller, an implied warranty that they shall be of a quality saleable in the market under the denomination in question (*h*); and, whether there is

(*d*) *Perry* v. *Barnett* (1885), 14 Q. B. D. 467; (1885), 15 Q. B. D. 388.

(*e*) *Morley* v. *Attenborough* (1849), 3 Exch. 500.

(*f*) Act 1893, s. 14; *Ormrod* v. *Huth* (1846), 14 M. & W. 664.

(*g*) 2 Roll. Rep. 5.

(*h*) Act 1893, ss. 13, 15

an opportunity of inspection by the buyer or not, the seller of an ordinary commodity manufactured in the particular instance by himself, and bought for a known and ordinary purpose, implicitly warrants that it has no latent defect to make it unfit for such known and ordinary purpose (*i*). All these principles are recognized by, and re-formulated in, the Sale of Goods Act, 1893, ss. 13—15 (*k*). And upon a sale by sample there are implied conditions that the bulk shall correspond with the sample, that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, and that the goods shall be free from any defect not apparent in the sample, which would render them unmerchantable. Of course, there may in all cases be, if the parties so choose, an *express* warranty, either as to title or as to the soundness or other quality of the articles. And the use of the word *warrant* is not in any case essential; for a mere representation may amount to a warranty, if a warranty was thereby intended (*l*), which intention will be a question for the jury (*m*).

Sales by factors, etc.—In mercantile transactions, the sale of goods is frequently effected by means of *factors* or *brokers*,—both being agents remunerated by a commission, though otherwise differing considerably in their capacities; for factors are entrusted with the possession of the goods, and are authorized to sell them in their own names, as the apparent owners, while brokers as such have no such possession or authority, but act avowedly as agents simply for the two contracting principals. Within the city of London, brokers were at one time required to be licensed or admitted by the lord mayor and aldermen; but this is

(*i*) Act 1893, s. 14; *Drummond* v. *Van Ingen* (1887), L. R. 12 App. Ca. 284.

(*k*) *Gillespie Brothers* v. *Cheney*, [1896] 2 Q. B. 59; *Varley* v. *Whipp*, [1900] 1 Q. B. 513.

(*l*) Act 1893, s. 11.

(*m*) *Hopkins* v. *Tanqueray* (1855), 15 C. B. 130.

no longer so, so that factors and brokers are now in that particular alike. Furthermore, neither factors nor brokers are, generally speaking, answerable for the due payment of the price by the party to whom they sell, for they are but agents for their principals (*n*); but if a factor makes sales on what is called the *del credere* system, he undertakes to be responsible for the price, receiving on that account a higher commission from his employer (*o*). And by the custom of merchants, or of any particular trade, the broker may also be personally responsible (*p*).

At common law, if a factor or broker, or any agent entrusted with the possession of goods, disposed of them to a stranger in a way not warranted by the nature of his authority,—or if he pledged them when authorized only to sell,—the title so derived from him would have been ineffectual against his principal (*q*); but, for the protection of third persons dealing with factors and other persons entrusted with the possession of goods, or with the written *indicia* of property therein, the Factors Acts, 1823 to 1877, were from time to time passed by the Legislature; the short effect of which statutes was, that sales and mortgages effected by factors, with *bonâ fide* purchasers and *bonâ fide* mortgagees, were in general rendered valid as against the principals of such factors (*r*). And although all these last-mentioned Acts have now been repealed, their provisions have been re-enacted, with amendments, by the Factors Act, 1889; and this last-mentioned Act is of such importance in the law of mercantile contracts, that some detailed statement of its provisions may here be acceptable. The Act, then, after defining a "*mercantile*

(*n*) *Perry* v. *Barnett* (1885), 15 Q. B. D. 388.

(*o*) *Couturier* v. *Hastie* (1852), 8 Exch. 40, 56; 9 Exch. 102; *Sutton* v. *Grey*, [1894] 1 Q. B. 285.

(*p*) *Pike* v. *Ongley* (1887), 18 Q. B. D. 708.

(*q*) *Daubigny* v. *Duval* (1794), 5 T. R. 604.

(*r*) *Sheppard* v. *The Union Bank of London* (1862), 7 H. & N. 661; *Kaltenbach* v. *Lewis* (1885), L. R. 10 App. Ca. 617.

"*agent*" as one "who, *in the customary course of his business* "*as agent*, has authority either to sell goods, or to consign "goods for the purpose of sale, or to buy goods, or to raise "money on the security of goods," provides (in effect) as follows:—(1) That where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods (that is to say, of the bill of lading, delivery order, or the like), any sale, pledge, or other disposition of the goods made by him in the ordinary course of his business shall be as valid as if he were expressly authorized by the owner to make the sale, pledge, or disposition, in favour of third persons taking under the disposition in good faith (sect. 2); (2) That a pledge of the documents of title to goods shall be deemed to be a pledge of the goods (sect. 3); but (3) That where the pledge is for an antecedent debt, the pledgee shall acquire no further right than the pledgor had at the time (sect. 4). And with reference to the consideration necessary for the validity of any such sale, pledge, or other disposition, the Act provides, (4) That it may be either a payment in cash, or the delivery or transfer of other goods (or of the documents of title to other goods), or the delivery or transfer of a negotiable security, or (in fact) any other valuable consideration; but where the consideration is the delivery or transfer of other goods (or of the documents of title to other goods), or of a negotiable security, the pledgee shall acquire no right or interest in the pledge beyond the value of the consideration (sect. 5). And with regard to consignors and consignees, the Act provides, (5) That where the consignor has so parted with the possession as aforesaid, for such purposes of disposition by or through a third party as aforesaid, the consignee shall, in respect of advances made by him to or for the use of such third party on pledge of the goods, have the same lien on the goods as if such third party were the owner of the goods, and may transfer such lien accordingly (sect. 7). With regard to sellers and buyers generally, it is provided by sections 8

and 9 of the Factors Act, which are now re-enacted by the Sale of Goods Act, s. 25, *first*, that where the seller (after a sale thereof) continues in possession of the goods (or of the documents of title thereto), any delivery or transfer made on a purported sale or pledge by the seller (or by his mercantile agent) of the goods (or of the documents of title thereto) to any person receiving the same in good faith, shall have the same effect as if the delivery or transfer were fully authorized; and, *secondly*, that where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods (or of the documents of title thereto) before payment, any delivery or transfer made on a purported sale or pledge by the buyer (or by his mercantile agent) of the goods (or of the documents of title thereto) to any person receiving the same in good faith, shall have the same effect as if the delivery or transfer were fully authorized (*s*). The Factors Act further provides (sect. 10), that where the lawful transferee of a document of title to goods transfers the document to any person receiving the same in good faith and for value, such second transfer shall defeat any lien or right of stoppage *in transitu* which the first transferor would have had, or would have been entitled to exercise over the goods (*t*). But all these provisions, being designed merely for the protection of *bonâ fide* purchasers and pledgees, and only to the extent of their purchases or pledges, it follows of course (and the Factors Act also expressly provides) (sect. 12), that (subject always to the purchase or pledge being treated as valid) the principal (or owner) may (1) recover the goods from the agent (or from his trustee in bankruptcy) at any time before the actual sale or pledge thereof; or (2) redeem the goods at any time (before the sale thereof) on satisfying the pledgee for the

(*s*) *Heiby* v. *Matthews*, [1895] A. C. 471; *Lee* v. *Butler*, [1893] 2 Q. B. 318.

(*t*) Re-enacted in s. 47 of the Sale of Goods Act, 1893.

amount of the pledge,—or (after a sale of the pledge) recover from the pledgee the surplus sale proceeds; or (3) recover from the buyer (subject to any right of set-off between him and the agent) the price remaining unpaid in the hands of the buyer. But, save in cases to which the Act applies, the common law rule is still applicable; so that, *e.g.*, an agent intrusted with jewellery to sell on commission could not make a valid pledge thereof, for he is not a "mercantile agent" within the meaning of the Act (*u*).

(*u*) *Hastings* v. *Pearson*, [1893] 1 Q. B. 62.

CHAPTER V.—SECTION IV.

THE CONTRACT OF BAILMENT.

Definition and meaning.—Bailment (from the French *bailler*, to deliver) is a delivery of goods for some purpose, upon a contract, express or implied, that, after the purpose has been fulfilled, the goods shall be re-delivered to the bailor, or be otherwise dealt with according to his directions, and in the meantime be kept till he reclaims them. [Thus, if cloth be delivered to a tailor, to make a suit of clothes, he has the cloth upon an implied contract to render it again when made; and if moneys or goods be delivered to a common carrier, to convey them from Oxford to London, he is under a contract to carry them to the place appointed (*a*); and if goods be delivered to an innkeeper, he is bound to keep them safely, and to restore them when his guest leaves the house; and if a man take in a horse, ox, or other cattle to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them, on demand, to the owner (*b*). And if a debtor bail goods to his creditor by way of pledge or *pawn*, the pawnee has them on the condition of restoring them on the debt being discharged; and a pawnbroker who receives plate or jewels as security for the repayment of money lent, has them upon a contract or condition to restore them if the borrower redeem them in due time,—which he may do at any time while the goods still remain in the hands of

(*a*) *Black* v. *Baxendale* (1847), 1 Exch. 410

(*b*) *Corbett* v. *Packington* (1827), 6 B. & C. 268.

[the pawnbroker unsold (*c*). Again, if one should deliver anything to his friend to keep for him, the friend is bound to restore it on demand, this being the contract of *depositum*] ; and if you lend any chattel (*e.g.*, your reading-desk) to your friend, although for your friend's use in the meantime, he is bound to return it when the period of the loan is expired, this being the contract of *commodatum* ; and these two contracts, namely, *depositum* and *commodatum*, are both of them gratuitous, that is to say, without fee or reward. So, if a chattel be let out on hire for a stipulated time, or for a particular service, the hirer is under an obligation to restore it when the time is run out, or the service peformed, this being the contract of *locatio rei*, which is always for payment. There may also be a *locatio operarum*, which is in fact simply a contract for services to be rendered ; and a *locatio operis faciendi*, which is merely a contract for the construction of some building or other work.

Duties of bailee.—There is a difference in the degree of the responsibility attaching to different classes of bailments, —For, First, upon a bailment which is for the mutual benefit of bailor and bailee, the latter is liable for *negligence*, viz., for the omission of that degree of diligence which a man of common prudence takes of his own concerns ; Secondly, upon a bailment from which the bailee derives no benefit, nothing short of *gross* negligence will make him responsible ; and, Thirdly, upon a bailment for the bailee's own exclusive benefit, he will be chargeable even for *slight* negligence. But in no case is an ordinary bailee, without some negligence on his part, liable for a robbery or other casualty (*d*). A bailor is under some duty to his bailee ; for example, if the bailment is of a chattel to be used by the bailee for some particular purpose, the bailor will be

(*c*) *Walter* v. *Smith* (1822), 5 B. & Ald. 439.

(*d*) *Cogge* v. *Bernard* (1704), 2 Ld. Raym. 909 ; *Giblin* v. *McMullen* (1868), L. R. 2 P. C. 317 ; *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92. (For the special liability of innkeepers and carriers, see *post*, pp. 122—127.)

liable for an injury in such use of the chattel which results from a defect in the chattel known to the bailor, and not communicated by him to the bailee (*e*).

[In all bailments, a special or qualified property is transferred (along with the transfer of the possession) from the bailor to the bailee, the absolute property remaining in the bailor; and on account of this qualified property of the bailee, he, as well as the bailor, may maintain an action against such as injure or take away the chattel (*f*). For, particularly where the bailee is responsible to the bailor, if the goods be damaged while in his custody, or if he do not deliver them up on lawful demand, it is reasonable that he should have a right of action against those who may injure them or take them away.] And bailees have also, in certain instances, a right of *lien*, in respect of the goods committed to their charge, the rule of law being, that every person to whom a chattel has been delivered for the purpose of bestowing his labour upon it, has a lien thereon; and he may withhold such chattel from the owner (in the absence at least of any usage or special agreement to the contrary) until the price of that labour is paid. For example, a tailor is not bound to deliver up the clothes which he has made, except upon receiving the price which is justly due for the making (*g*); and he has a lien on them (called a *particular* lien) for the price. The law also recognises a *general* lien, being a lien which entitles the bailee, in a few cases or under special circumstances, to detain a chattel from its owner until payment be made, not only of the expenses incurred on that particular article, but of

(*e*) *Blakemore* v. *B. & E. Rail. Co.* (1858), 8 El. & Bl. 1035; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145.

(*f*) *The Winkfield*, [1902] P. 42. [The doctrine of a "special property" in the bailee, though sanctioned by usage, appears to be quite unnecessary. The true explanation of the bailee's rights against third parties is, that he has *possession*, which, as against mere wrongdoers, is conclusive evidence of title.—E. J.]

(*g*) *Chapman* v. *Allen* (1632), Cro. Car. 272.

any balance that may be due to the bailee on a general account between the bailor and himself. These general liens depend entirely upon the contract between the parties, whether such contract is express or is only implied from the usage of the particular trade or from the previous course of dealings ; but this usage (it has been expressly decided) exists in the case of solicitors, bankers, auctioneers, factors, packers, and warehousemen. All such bailees have consequently a lien for the amount of the general balance due to them from their customers.

Innkeepers as bailees.—We must now consider more particularly these two classes of bailees, namely, *innkeepers* and *carriers*. And, First, a COMMON INNKEEPER,—which term includes in law the keeper of every tavern or house of public entertainment in which lodging for travellers is provided (but not a boarding-house keeper (*h*), nor a lodging-house keeper) (*i*),—is held responsible by the common law for the goods and chattels brought by any traveller to his inn, in the capacity of guest there, in every case where they are either lost, damaged, or stolen (*k*). To this rule there was no exception permitted by the common law, except where it would have been obviously unjust to apply the rule ; as, for example, where the goods were lost entirely through the guest's own gross negligence (*l*), or where they were stolen from his own person, or by his own servant, or from a room which he occupied otherwise than as a guest (*m*). However, by the Innkeepers Liability Act, 1863, no innkeeper is now liable to make good to a guest any loss or injury to goods or property brought to his inn (not being a horse or other live animal or any gear appertaining thereto, or any

(*h*) *Dansey* v. *Richardson* (1854), 3 El. & Bl. 144.

(*i*) *Holder* v. *Soulby* (1860), 8 C. B. (N.S.) 254.

(*k*) *Calye's Case* (1584), 1 Sm. L. C. 115.

(*l*) *Calye's Case*, *ubi sup.* ; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11.

(*m*) *Richmond* v. *Smith* (1828), 8 B. & C. 11.

carriage—the liability as to which remains as at common law), to a greater amount than 30*l.*, except the goods be stolen, lost, or injured through the wilful act, or the default or neglect of the innkeeper or his servant, or unless they have been deposited expressly for safe custody with the landlord. To entitle the innkeeper to the benefit of the Act, it is only required of him, that a copy of this provision should be conspicuously exhibited in the hall or entrance to his inn (*n*). A common innkeeper is one who has no option as to the customer with whom he will deal, being legally bound to receive and entertain every traveller who presents himself for that purpose, and who is ready to pay his expenses, provided only there be sufficient room in the inn (*o*), and no impropriety of conduct, or undue prolongation of stay on the part of, the traveller himself (*p*). An innkeeper is not entitled to detain the person of his guest,—or to strip off his clothes,—in order to secure the payment of the charges which have been incurred; but he has a lien on any goods brought by the defaulter into or upon the premises (*q*). By the Innkeepers Act, 1878, an innkeeper is empowered, by way of realising his lien, to *sell* by public auction (after an interval of six weeks, and having first given due notice to the owner) any goods, chattels, carriages, horses, wares, or merchandise deposited or left with him on his premises, in cases where the party depositing or leaving the same has become indebted to him for board or lodging, or for the keep of a horse or other animal left at livery; but any surplus of the sale-proceeds is to be paid over to the owner.

Common carriers as bailees.—A COMMON CARRIER is one who professes to carry from one place to another such

(*n*) *Spice* v. *Bacon* (1877), 2 Ex. D. 463; *Medawar* v. *Grand Hotel Co.*, *supra*.

(*o*) *The Queen* v. *Rymer* (1877), 2 Q. B. D. 136; *Browne* v. *Brandt*, [1902] 1 K. B. 696.

(*p*) *Lamond* v. *Richard*, [1897] 1 Q. B. 541.

(*q*) *Robins* v. *Gray*, [1895] 2 Q. B. 501; *Gordon* v. *Silber* (1890), 25 Q. B. D. 491.

goods as shall be delivered to him for carriage by any person (*r*). He is looked upon by the common law as an insurer of the goods delivered to him to be carried; that is to say, he is answerable for every loss or injury to such goods, not occasioned by the act of God or the king's enemies (*s*). He is moreover bound to receive, and without unreasonable delay to forward to their destination (being within the limits of his accustomed journeys), the goods of every applicant who is ready to pay the price of carriage, provided he has room for them in his conveyance (*t*). But to this liability of carriers, an exception was permitted in the case of any material negligence (in the way of packing or otherwise) on the part of the owner of the goods (*u*). The liability might also be varied by a special contract between the parties relative to the terms on which any particular goods were to be carried; and it was formerly competent also to the carrier, by a public notice of the terms on which he would deal (as by a notice that he would not be liable for goods beyond a certain value, unless booked as such, and paid for at a higher rate), to limit to a certain extent the measure of his liability. For upon proof—direct or presumptive (*x*)—that such notice had come to the knowledge of the customer before the goods were sent, the law implied a special contract between the parties conformable to the terms of the notice. And such is still the law with respect to the liability of common carriers (whether by land or water), except as otherwise provided for by statute. The statutory provisions which have modified in some respects the common law liability are shortly as follows:—

(*r*) *Dickson* v. *G. N. Railway* (1886), 18 Q. B. D. 176.

(*s*) Co. Litt. 89; *Cogge* v. *Bernard* (1703), 2 Ld. Raym. 918; *Nugent* v. *Smith* (1876), 1 C. P. D. 423.

(*t*) *Pickford* v. *Grand Junction Railway Company* (1844), 12 M. & W. 766.

(*u*) *Robinson* v. *Dunmore* (1800), 2 Bos. & P. 419.

(*x*) *Walker* v. *York Railway* (1853), 2 El. & Bl. 750.

First, as to Carriers BY LAND :—The Carriers Act, 1830, has provided, that no public notice shall limit or in anywise affect the carrier's liability as existing at common law, for any goods in respect whereof he is not entitled to protection under the Act. But it proceeds to enact, that no carrier by land shall be liable for any loss or injury to gold or silver coin, jewellery, lace (not including machine-made lace) (*y*), engravings, and a variety of other articles specified in the Act, *when the aggregate value of the parcel delivered for carriage shall exceed ten pounds*, unless at the time of delivery the value and nature of the contents shall have been declared, and such increased freight paid thereon, as by a legible notice affixed in the office of the carrier shall have been previously advertised to the public, as the scale by which such articles will be charged for. If no such notice shall have been affixed, or increased charge demanded on the value being declared (*z*), or if the carrier shall refuse (on being paid the increased charge) to give a receipt acknowledging the parcel to be insured, or if loss or injury arise from the *felonious* act of a servant in the carrier's employ (*a*), then he is not entitled to the benefit of the statute, but remains liable as at common law. The Act contains also a proviso, that nothing contained therein shall affect any *special* contract between the carrier and the customer, or shall protect any servant of the carrier from liability or loss occasioned by his own personal neglect or misconduct (*b*).

The liability of *railway*, *canal*, and *navigation companies* in respect of the carriage of goods is the same as that of other carriers, except so far as varied by certain statutes, and in particular the Railway and Canal Traffic Acts of 1854 to 1894, and the Regulation of Railways Acts, 1840 to

(*y*) 28 & 29 Vict. c. 94.

(*z*) *The Great Northern Railway Company* v. *Behrens* (1862), 7 H. & N. 950.

(*a*) *Stephens* v. *London and South Western Railway* (1886), 18 Q. B. D. 121.

(*b*) *Richardson* v. *Rowntree*, [1894] A. C. 217.

1893. The general effect of these Acts may (so far as this question of liability is concerned) be stated as being to prevent such companies (regarded as common carriers) from entering into *special* contracts limiting their common law liability with respect to the receipt, forwarding, and delivery of goods, *unless the conditions of the special contract are reasonable* (*c*), *and the contract is a written contract, signed by or on behalf of the consignor.* The reasonableness of the conditions is determined by the judge, before whom the action comes to be tried, in which the special contract is raised as a defence by the company (*d*). But, of course, as regards passengers' luggage, the contract of carriage being for the carriage of the passenger himself as well, if he interfere with the luggage, he may himself be taken to have contributed to the loss of it, and when, *e.g.*, he takes it into the carriage with him, he may reasonably be deemed to have assumed the entire custody of it; and the liability of the carrying company in such cases is very difficult to determine, being dependent on the particular facts in each case of loss (*e*). There are also, as regards the carriage of such substances as petroleum and dangerous explosives generally, specific statutory provisions which it does not fall within the scope of this discussion to refer to.

With regard to carriers BY SEA :—It is to be observed, that the liability of a ship-owner—though he is in contemplation of law a common carrier, if the ship be ordinarily hired to carry goods—does not usually rest on the common law rule, but on a special contract created between the parties, by the bill of lading or charterparty

(*c*) *Shaw* v. *Great Western Railway*, [1894] 1 Q. B. 373.

(*d*) *Peek* v. *The North Staffordshire Railway* (1863), 10 H. L. C. 473; *Great Western Railway Company* v. *McCarthy* (1887), L. R. 12 App. Ca. 218.

(*e*) *Bergheim* v. *G. E. Rail. Co.* (1873), 3 C. P. D. 221; *G. W. Rail. Co.* v. *Bunch* (1888), L. R. 13 App. Ca. 31; *Meux* v. *G. E. Railway*, [1895] 2 Q. B. 387.

which usually attends a shipment of goods. Such contract is commonly framed so as to exempt the carrier by sea from loss or injury occasioned by the act of God, or of the king's enemies, or by the perils of the sea. The Merchant Shipping Act, 1894, s. 502, provides, that no owner of any sea-going ship, or of any share therein, shall be liable to make good any loss or damage, *occurring without his own actual fault or privity*, to goods or things on board, by reason of *fire* breaking out on board; or to any gold, silver, diamonds, watches, jewels, or precious stones, occasioned by *robbery or embezzlement*, unless the true nature and value of such articles shall have been declared in writing to the master or owner. By s. 503 of the Act of 1894 it is further provided that, in respect of any loss or damage to goods which occurs *without his own actual fault or privity*, no shipowner shall be answerable to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage, such tonnage in the case of sailing vessels being their registered tonnage, and in the case of steam vessels their gross tonnage, without deduction of engine-room.

CHAPTER V.—SECTION V.

THE CONTRACT OF LOAN.

THE contract for the loan of money (which was called *mutuum* by the civilians in order to distinguish it from the *commodatum* already spoken of) differs from the ordinary contract of bailment, inasmuch as the money which forms its subject is not to be re-delivered to the lender, or disposed of according to his direction, but is to be applied to the use and according to the wishes or the necessities of the borrower, the borrower yielding afterwards to the lender an equal sum by way of re-payment; in addition to which re-payment, there is commonly also yielded an increase, by way of compensation for the use of the sum advanced, which increase is called *interest*. [In former times, it was considered by many good and learned men, that all increase of money by way of interest was against conscience, for that it was forbidden by the law of Moses;] but the objection has been at all times little regarded, and perhaps has been the least regarded of all people by the very people to whom the law of Moses is an object of the supremest regard. [And the practice of taking interest on loans has in general been sanctioned by all legislators both antient and modern, and there has prevailed at the most a desire to restrict by positive enactment the exorbitancy of the interest which might be lawfully taken. For example, the Romans, whose law of the Twelve Tables prescribed *fœnus unciarium* (or about 8 per cent. per annum) afterwards allowed *centesimæ*, that is to say, 12 per cent. per annum; but Justinian reduced the general rate to 4 per cent., allowing higher interest (rising even to 12 per

[cent.) to be taken where the hazard was greater (*a*). Lord Bacon was desirous of introducing a similar policy into England (*b*), where in general the amount of interest was limited, all interest beyond the legal limit having been prohibited as *usury*. The legal rate under the 37 Hen. VIII. c. 9, was 10 per cent., which limit was retained by the 13 Eliz. c. 8 ; but the 21 Jac. I. c. 17, reduced it to 8 per cent., and the 12 Car. II. c. 13, to 6 per cent. And lastly, the statute 13 Anne, c. 15, reduced it to 5 per cent., which last-mentioned rate continued the maximum legal rate, in this country,] until all the laws in restraint of usury were repealed, as will be presently mentioned.

There were, however, at all times certain cases in which the legal rate of interest (even before the repeal of the laws against usury) was subject to no restriction whatever, *e.g.*, First, when the contract was made in a foreign country, in which case the interest was payable according to the law of the country in which the contract was made (*c*) ; and secondly, when the right to recover the money lent was, by the terms of the loan, put in jeopardy, which latter species of hazard, being a very different matter from the ordinary risk of insolvency, was esteemed a sufficient consideration for allowing a rate of interest higher than the legal rate.

The peculiar hazard referred to occurred in the case of *bottomry* (or *respondentia*) bonds, and in the case of *annuities upon lives* ; and these two peculiar species of loans, it will be convenient to here consider more at large.

First, [BOTTOMRY :—This species of loan is when the owner of a ship takes up money on it to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the repayment (*d*). This pledge may be given, and a valid contract of bottomry entered into, even by the master of the vessel,

(*a*) Cod. 4, 32, 36 : Nov. 33, 34, 35.

(*b*) *Essays*, ch. 41.

(*c*) 1 Eq. Ca. Ab. 289.

(*d*) See *The Atlas* (1827), 2 Hag. Adm. 53.

[in a case of absolute necessity, and to the extent only of the necessity (*e*). It is one of the terms of this contract of bottomry, that, if the ship be lost, the lender loses also his whole money; but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, which premium or interest, whatever its amount, has always been allowed by reason of the extraordinary hazard run by the lender (*f*).

A *respondentia* bond differs from a bottomry bond (properly so called), in that the former extends not to the ship and tackle, but only to the goods and merchandize; so that, in general, only the borrower himself personally is bound by it.

Contracts of an analogous character are also sometimes effected on the mere hazard of the voyage itself, as when a man lends a merchant 1,000*l*., to be employed upon a voyage, upon the condition of being repaid with extraordinary interest, in case the voyage be safely performed; the interest or recompense which is payable to the lender on this kind of agreement being formerly called sometimes *fœnus nauticum*, and sometimes *usura maritima* (*g*). But since the repeal of the usury laws, the distinction as to interest is, of course, immaterial.

Secondly, ANNUITIES FOR LIVES:—These are contracts in which the borrower of money, being unable to give the lender any tangible security for the return of the money at any given period of time, undertakes or promises (in effect) to repay annually, during his life, some part of the money borrowed, together with interest for so much of the principal as annually remains unpaid, *rendering also some additional compensation for the hazard run by the lender of losing the whole or a portion of the principal by the borrower's death.* The right to recover the principal being thus in

(*e*) *The Pontida* (1884), 9 P. D. 177.

(*f*) *The Atlas*, *supra*; *The Great Pacific* (1869), L. R. 2 P. C. 516.

(*g*) Malynes, *Lex Mercat.* b. 1, ch. 31.

[jeopardy, a transaction of this kind was never looked upon as an usurious bargain, not even when the life of the borrower was insured for the benefit of the lender, and the amount of the annuity was adjusted to cover the expense of the insurance, or when the borrower himself insured his own life, at his own expense, for the benefit of the lender (*h*).]

When these annuities were granted, in such manner as to be charged upon (or made to issue out of) lands, then and in order that it may be ascertained by subsequent purchasers and mortgagees of the lands what life annuities have been charged thereon, they were required to be registered in the Central Office of the High Court of Justice. And they were at one time required to be enrolled under the Annuity Act, 1813, which Act has been repealed. And now, by the Judgments Act, 1855, no annuity or rentcharge granted after the passing of the Act, (otherwise than by marriage settlement or by will,) for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, will affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, without notice, until a memorandum, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is affected thereby, and the date of the instrument whereby the annuity or rentcharge is granted, and the amount of the annual sum to be paid, has been registered at the Central Office (now at the Land Registry (*i*)); and the particulars aforesaid are entered in alphabetical order, in the name of the person whose estate is affected by the annuity or rentcharge.

The laws against usury being found, however, to impose inconvenient restraints upon the price of money, and being

(*h*) *Downes* v. *Green* (1844), 12 M. & W. 481.

(*i*) Land Charges Act, 1900.

found at the same time not to afford any real protection to improvident borrowers, it was enacted by the Usury Laws Repeal Act, 1854, that all the existing laws against usury should be repealed. But the repeal of the usury laws has in no way interfered with the right to be relieved in a court of equity against exorbitant or iniquitous bargains (*k*) ; and now, by the Money-lenders Act, 1900, the court may, in harsh and unconscionable cases, give relief against excessive interest or costs (*l*).

Interest may accrue not only upon a contract of loan, but in other cases also, *e.g.*, on a balance admitted to be due ; for although the general rule of the common law was against *implying* any contract for the payment of interest on money due, yet to this rule there were certain exceptions : first, in the case of overdue bonds, bills, and notes ; secondly, where there was a special usage of trade for the allowance of interest ; thirdly, where the same parties had, in former accounts of the same description, claimed interest on the one side, and allowed it on the other. And it has now been provided generally, by the Civil Procedure Act, 1833, s. 28, that "upon all debts or "sums certain, payable at a certain time, or otherwise," the jury may "allow interest to the creditor at a rate not "exceeding the current rate of interest ; and when such "debts or sums certain are payable by virtue of some "written instrument at a time certain, from that time ; "and when payable otherwise, then from the time when "*demand of payment* shall have been made in writing, so "as such demand shall give notice to the debtor, that "interest will be claimed from the date of such demand, "until the time of payment." And by the same Act, it is further provided, that the jury may give *damages in the nature of interest*, in actions for the wrongful seizure or conversion of goods, and in actions on policies of

(*k*) *Brenchley* v. *Higgins* (1901), 83 L. T. 751.

(*l*) *Wilton* v. *Osborn*, [1901] 2 K. B. 110.

insurance; and that where proceedings in error (or, now, on appeal) are taken by the defendant in an action, and judgment is given for the original plaintiff, interest shall be allowed him for the delay thereby occasioned (*m*). By the Judgments Act, 1838, s. 7, every judgment debt now carries interest, at the rate of four per cent., from the time of entering up the judgment, until the satisfaction thereof; and such interest may be levied along with the principal under a writ of execution. Also, interest on the *costs* of an action is allowed, in an action for debt or the like, as from the date of the judgment; and in other actions, as from the date of the taxing master's certificate or allocatur (*n*).

(*m*) See generally on the Act, *Re Horner*, [1896] 2 Ch. 188; *L. C. & D. Ry.* v. *S. E. Ry.*, [1892] 1 Ch. 120.

(*n*) See Order xlii. rule 16, R. S. C.

CHAPTER V.—SECTION VI.

THE CONTRACT OF PARTNERSHIP.

THE contract of partnership arises where two or more persons carry on any business together, upon the terms of mutual participation in its profits and losses,—and this, whether they are to participate in equal shares or in any other proportions. The Partnership Act, 1890, which has now codified the law on the subject, defines a partnership as "the relation which subsists between persons carrying "on business in common with a view to profit," and not being the case of Companies registered under the Companies Acts, 1862 to 1900, or otherwise incorporated, nor being Cost Book Mining Companies, nor Companies engaged in working mines within the Stannaries of Cornwall and Devon (*a*). The number of persons who may be so associated together must not exceed twenty in ordinary cases, or ten in the case of a banking business; for otherwise, the association will be illegal, unless it be registered as a company (*b*). A partnership is usually constituted by a written agreement, commonly by deed, the provisions of the deed being denominated the "articles "of partnership"; but a partnership may also be constituted without any writing, and may even be implied from the conduct of the parties. The partners constitute what in law is called a *firm*, and they trade under the *firm-name* (*c*); but the firm, unlike a company or corporate body, is not an entity of itself, and the individual partners do not lose their individuality therein. Partners

(*a*) Section 1 of the Act.
(*b*) Companies Act, 1862, s. 4.
(*c*) Partnership Act, 1890, s. 4.

may, however, by Order XLVIIIA. of the Rules of the Supreme Court, now sue and be sued in their firm name.

A partnership may be dissolved, if the period of its proposed duration be indefinite, at the pleasure of either party (*d*); or if (as is more frequent) the partnership be for a term certain, it may be dissolved, either by the natural expiration of that term, or, at an earlier period, by the mutual agreement of the parties, or by a decree of the court, if there are proper grounds for such decree. Such grounds are specified in section 35 of the Act. Moreover, the death or bankruptcy of any of the partners will, in any case, amount to a dissolution of the firm, unless the partnership articles should (as they may) expressly provide against that event (*e*). A partnership will also be dissolved on the happening of any event which renders its further continuance illegal (*f*).

One of the most important doctrines attaching to the relation of partnership is, that a contract made or act done or instrument executed by any partner in matters relating to the business of the partnership is, in point of law, the contract or act of all the partners; consequently, such contract or act is binding upon them all, in such sense as to render each partner liable upon it individually (*g*). This rule has been established for the benefit of commerce, the doctrine being founded on the principle, that the relationship of principal and agent exists between each partner and his co-partners in all matters which fall within the scope of the partnership business, so that by the act of the agent his principal is bound (*h*). This rule holds good, in a general way, even where the act of the individual partner would, as between himself and his co-partners, be contrary to the partnership articles. But, where the person with whom the individual partner is

(*d*) Section 32 of the Act.
(*e*) Section 33.
(*f*) Section 34.
(*g*) Sections 5 & 6 of the Act.
(*h*) *Fox* v. *Clifton* (1860), 6 Bing. 795; *Cox* v. *Hickman* (1860), 8 H. L. C. 268.

dealing is at the time aware, or has reason to suppose, that the act is in the nature of a fraud on the other partners, and unauthorized, it will not in such a case be binding on them (*i*). And where an individual partner enters into a transaction in the name of the firm, after notice expressly given by or on behalf of the firm to the person with whom he deals that the act is unauthorized, the co-partners will not be bound by it; for by this express notice their implied sanction is displaced (*j*). The implied authority of partners to bind their firm is one which does not extend to matters extraneous to the joint concern, nor to matters which, though connected with it, are, by the ordinary usage of business, transacted with the express and formal intervention of all the partners. For example, it is settled law, that one member of a firm has no implied authority to refer to arbitration a dispute in which the partnership is involved with a stranger (*k*), nor to execute a deed in the name of the partnership (*l*), nor to bind the firm by a guarantee (*m*). In these cases, the other members of the firm must either be actual parties to the transaction, or must give their special consent that the one partner should act for them in the matter; and that special consent must be authenticated by deed, where a deed is to be executed in the name of the partnership. As regards accepting bills of exchange or making promissory notes, a partner has implied authority to bind the firm only in the case of a *trading* partnership. In other cases, in order to make the firm liable upon the bill or note, it must be shown that such a course of dealing is necessary or usual in the particular business (*n*).

(*i*) Sections 7 & 8 of the Act.

(*j*) *Lord Galway* v. *Matthew* (1808), 10 East, 264.

(*k*) *Stead* v. *Salt* (1825), 3 Bing. 101.

(*l*) *Harrison* v. *Jackson* (1797), 7 T. R. 207.

(*m*) *Brettel* v. *Williams* (1849), 4 Ex. 623.

(*n*) *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P. C., at p. 194; *Yates* v. *Dalton* (1858), 28 L. J. Ex. 69.

A partnership may, as regards strangers or third persons, be an actual partnership, although it purport not to be so as between the partners themselves (*o*). For a man who is not really a partner, may nevertheless allow his credit to be pledged as a partner, as in the case where his name appears in the firm, or where he interferes in the management of the business, or otherwise "*holds himself out*" as a partner, so as to produce a reasonable belief in strangers that he is a partner (*p*); in which cases he is answerable as an ostensible partner to all who deal with the firm without having notice at the time that he is in fact not a partner. It frequently happens also, that a partnership comprises some member not generally known to be interested in the business or adventure, the firm name not usually containing the names of all the members. A partner thus unknown to the public is a *dormant* partner; and every person dealing with the firm is entitled, when he discovers the existence of such dormant partner, to hold him chargeable with the others (*q*).

A man does not become a partner merely from owning property in common with others, or even from participating in the profits of the partnership (*r*), although the contrary was at one time supposed. Participation in profits is, however, an important element in determining whether or not, and is in most cases *primâ facie* evidence that, the parties interested in the common business are partners therein (*s*). But it is expressly provided by the Partnership Act, 1890, s. 2, re-enacting (with slight amendments) the like provisions which were contained in the statute 28 & 29 Vict. c. 86, commonly called

(*o*) *Davis* v. *Davis*, [1894] 1 Ch. 393; *Pooley* v. *Driver* (1876), 5 Ch. D. 458.

(*p*) Section 14 of the Act; and see *Mollwo* v. *Court of Wards* (1872), L. R. 4 P. C., p. 435; *Smith* v. *Bailey*, [1891] 2 Q. B. 403.

(*q*) *Heath* v. *Sansom* (1832), 4 B. & Ad. 172.

(*r*) *Cox* v. *Hickman*, *supra*; and *Davis* v. *Davis*, *supra*; section 2 of the Act.

(*s*) *Ibid.*

"Bovill's Act":—(1.) That the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such; (2.) That a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business, does not of itself make the servant or agent a partner in the business or liable as such; (3.) That a person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of such receipt, a partner in the business or liable as such; (4.) That the advance of money by way of loan to a person engaged, or about to engage, in any business on a written contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business (the contract being signed by all parties), does not of itself make the lender a partner with the person or persons carrying on the business or liable as such; and (5.) That a person receiving by way of annuity or otherwise a portion of the profits of a business, in consideration of the sale by him of the goodwill of the business, is not, by reason only of such receipt, a partner in the business or liable as such (*t*). The Act, however, provides, with regard to the fourth and fifth of the last-mentioned cases, that in the event of the bankruptcy or insolvency of the trader, the lender of money and the vendor of a goodwill can only recover the debt or share of profits contracted for, *after all other creditors of the trader for valuable consideration have been satisfied* (*u*).

There is this important difference between an ostensible

(*t*) *Pooley* v. *Driver* (1876), 5 Ch. D. 458; *Ex parte Delhasse, In re Megevand* (1877), 7 Ch. D. 511; *In re Hildesheim*, [1893] 2 Q. B. 357.

(*u*) Section 3 of the Act; *Re Mason*, [1899] 1 Q. B. 810.

and a dormant partner, namely, that an ostensible partner, when he retires, continues liable, on the future engagements of the partnership, to all persons who have before dealt with the firm, unless he gives them notice of the fact of his retirement; and he continues liable even to those who have not before dealt with the firm, until he gives public notice of his retirement in some sufficient way, as by advertisement in the Gazette. But a dormant partner, when he retires, is not liable on these future engagements at all, either to the former customers of the firm or to the new customers (*x*).

When a partnership entered into for a fixed term is continued after the due and full expiration of the term, and there is no new deed of partnership or express new partnership agreement, the rights and duties of the partners under the new partnership continue, after the expiration of the old term, the same as they were before, so far as they are consistent with the incidents of a partnership at will (*y*); unless, of course, when the partnership is (as it may be) merely continued with a view to the due winding up thereof (*z*).

On a dissolution of the partnership, every partner has a right to have the property of the partnership (including the goodwill of the business) applied in payment of the debts and liabilities of the firm, and to have the surplus assets applied in paying to each partner any advances made by him, and his share of capital, and to have any ultimate residue divided among the partners in the proportion in which profits are divisible (*a*).

(*x*) Section 36 of the Act; *Carter* v. *Whalley* (1830), 1 B. & Ad. 11.

(*y*) Section 27 of the Act; *Dix* v. *Herring*, [1892] 1 Ch. 231.

(*z*) Sections 27 and 38 of the Act.

(*a*) Sections 39 and 44 of the Act.

CHAPTER V.—SECTION VII.

THE CONTRACT OF GUARANTEE (OR OF SURETYSHIP).

Definition.—The contract of guarantee (or of suretyship) arises, where one man contracts, on behalf of another, an obligation for which the latter is and remains primarily liable,—*e.g.*, when a sum of money is advanced to A., and B. joins with him in giving a bond for its repayment; or where there is an agreement to supply A. with goods to a certain amount on credit, and in consideration thereof B. promises to see the seller paid for all the goods that shall be so supplied; or where A. is appointed a public officer, and B. joins with him in a bond, engaging that the duties of the office shall be faithfully performed by A. (*a*). The obligation of suretyship or guarantee must be carefully distinguished from two somewhat similar cases, *viz.*, (1) cases in which a person undertakes the primary liability in respect of an obligation contracted for the benefit of a third person (*b*); and (2) cases in which one person merely undertakes to indemnify another against some liability or risk (*c*).

Form.—Contracts of guarantee will not sustain an action, or be legally enforceable, if made by word of mouth only; for, by the Statute of Frauds, (29 Car. II. c. 3,) s. 4, no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the

(*a*) *Duncan & Co.* v. *N. & S. Wales Bank* (1880), L. R. 6 App. Ca. 11.

(*b*) See *Mountstephen* v. *Lakeman* (1870), L. R. 5 Q. B. 613.

(*c*) *Sutton* v. *Grey*, [1894] 1 Q. B. 285; *Guild* v. *Conrad*, [1894] 2 Q. B. 885; *Re Hoyle*, [1893] 1 Ch. 84; *Harburg Co.* v. *Martin*, [1902] 1 K. B. 778.

agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized. The writing must of course contain all the terms of the contract (*d*),—excepting that, by the Mercantile Law Amendment Act, 1856, s. 3, no such promise is now to be invalid to support an action, by reason only that the *consideration* for the promise does not *appear*, either in the writing or by necessary inference from the written document. But, of course, whenever such contract is (as it usually is) a simple contract, it must have a consideration in fact (*e*). And here it will be useful to observe, that the provisions of the Statute of Frauds as to guarantees having been readily evaded, and found accordingly to afford an insufficient protection to persons in the position of guarantors (*f*), it was afterwards further enacted by the Statute of Frauds Amendment Act, 1828, ("Lord Tenterden's Act,") s. 6, that *representations* by a third party regarding the character or trade-ability of a person, to whom credit was to be given on the faith thereof, should not render such third party answerable for debts contracted on the faith of such representations, unless the representations were in writing and were signed by the party making them.

Nature of contract.—The contract of guarantee or of suretyship is not in the strict sense a contract *uberrimæ fidei*; but any material misrepresentation to the surety or guarantor will entitle him to avoid his liability (*g*). By s. 18 of the Partnership Act, 1890, in the case of a guarantee to or for a *firm*, no such guarantee will (except where otherwise expressed or necessarily implied) be binding

(*d*) See *ante*, p. 67.

(*e*) *Creare* v. *Hunter* (1887), 19 Q. B. D. 341.

(*f*) *Pasley* v. *Freeman* (1789), 3 T. R. 51.

(*g*) *Lee* v. *Jones* (1864), 17 C. B. (N.S.) 503; *Seaton* v. *Heath*, [1899] 1 Q. B. 782; *Seaton* v. *Burnand*, [1900] A. C. 135.

in respect of anything done or omitted to be done, *after a change in the firm shall have taken place.*

Discharge of surety.—A guarantor or surety will be discharged: (1) if the principal debtor be released by the creditor, or if the debt or demand be by any means extinguished as between the two principals, for the surety's obligation, being collateral only, cannot survive the liability of the principal debtor himself (*h*); or (2) if the original risk should be substantially altered by the principals to the transaction without the surety's consent (*i*); or (3) if the creditor, without the surety's permission, consents in a binding manner to give time to the debtor, without expressly reserving his rights against the surety (*k*); or (4) by any negligence of the creditor which prejudices the surety (*l*).

Position of the surety.—The law moreover implies, in favour of the surety, a promise on the part of the principal debtor to *reimburse* and *indemnify* him—as well principal as interest,—for any payment which he is obliged to make under the guarantee; and where two or more persons have become sureties in respect of the same debt or demand (whether by the same instrument of guarantee or by different ones), any one of them who pays more than his rateable proportion is entitled, in general, (that is to say, subject to any express agreement excluding or qualifying the right) to obtain *contribution* for such excess from the other sureties (*m*). This right of contribution is available for the surety even before payment by him, if a judgment for the amount has been obtained against

(*h*) *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313; *Re E. W. A.*, [1901] 2 K. B. 642.

(*i*) *Holme* v. *Brunskill* (1872), 3 Q. B. D. 495.

(*k*) *Swire* v. *Redman* (1876), 1 Q. B. D. 542; and see *Greenwood* v. *Francis*, [1899] 1 Q. B. 312.

(*l*) *Taylor* v. *Bank of N. S. Wales* (1886), L. R. 11 App. Ca., p. 603

(*m*) Mercantile Law Amendment Act, 1856, s. 5; *Ellesmere Brewery* v. *Cooper*, [1896] 1 Q. B. 75.

him (*n*). Again, when the principal debt becomes due, the surety may apply to the court to compel the principal debtor to pay it off, and so to relieve him from any continuing liability (*o*). Finally, where the surety is himself obliged to make the payment, he is entitled, under the principle of *subrogation*, to stand in the shoes of the creditor against the principal debtor, and to have an assignment of every security which the creditor holds in respect of the debt, and to stand in the place of the creditor in respect of every such security, whether as against the principal debtor, or as against any co-surety (*p*).

(*n*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

(*o*) *Antrobus* v. *Davidson* (1817), 3 Mer. 579.

(*p*) Mercantile Law Amendment Act, 1856, s. 5; *Re Parker*, [1894] 3 Ch. 400; *Duncan Fox & Co.* v. *N. & S. Wales Bank* (1880), L. R. 6 App. Ca. 11; *In re Wrexham Rail. Co.*, [1899] 1 Ch. 440.

CHAPTER V.—SECTION VIII.

OF BONDS.

General nature.—Bonds are a kind of contract in very extensive use, being adopted in a great variety of cases, where the object is to secure either the payment of money, or else the performance of (or abstention from) some act. A bond is an instrument under seal, whereby the obligor obliges himself to the obligee to pay a certain sum of money at a day specified. The peculiar species of bonds called "Lloyd's Bonds" are in reality only bonds of this character, being instruments under the seal of a company, usually a railway company, admitting the company's indebtedness to the obligee in the sum specified in the bond, and containing a promise by the company to the obligee to pay him such amount with interest on a future day.

Bonds given by way of securing the payment of money are called *single* bonds; but where there is a condition added, that if the obligor does (or abstains from doing) some particular act, the obligation shall be void, or else shall remain in full force, then the bond is *a bond with a condition*, the sum mentioned in the obligatory part of the bond being a *penal sum* (or *penalty*), sufficient to cover any possible damage arising from a breach of the condition. The nature of the condition will in each case depend upon the particular object intended to be secured; [thus, it may be the repayment (with interest) of the principal sum borrowed of the obligee; or the periodical payment to him of an annuity; or the faithful performance, by a third person, of the duties of an office. Whatever the condition be, in case it is not performed, the bond becomes forfeited at law, and the obligation absolute; and such obligation charges the obligor, while living, and, after his death, his

[executor, or administrator, and also his heir or devisee, to the extent of the assets descending upon him.

If the condition of a bond be impossible at the time of making it, or be uncertain, the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released.] On the other hand, if the condition be to do a thing that is either illegal at common law, or contrary to the provisions of an Act of Parliament, the whole bond is void (*a*); for it is an unlawful contract, and the obligee shall take no advantage of such a transaction. And the effect will be the same, even though the condition be *ex facie* legal, if the bond was in reality given upon an illegal consideration, or if it be to effect an unlawful object which the condition does not disclose. For though, by the general rule of law, the parties to a deed are in general *estopped* from assigning to it any intent beyond that which appears on the instrument itself, yet an exception is permitted in this case, upon the obvious ground of public policy (*b*). But if the bond have several conditions, some of which are legal and others illegal, and the several conditions are of a nature entirely distinct from, and not dependent upon each other, the general rule is, that the illegal conditions only shall be void, and the bond shall continue in force subject only to the legal conditions (*c*). Where the condition of a bond was possible at the date of the making of the bond, and afterwards becomes impossible either through the act of God, or by reason of the conduct of the obligee, or if it becomes by any means illegal, in either of these cases, the bond is avoided, and the obligor is discharged from all liability; because no prudence or foresight on his part could have guarded against such a contingency (*d*).

(*a*) Co. Litt. 206 b.

(*b*) *Collins* v. *Blantern* (1767), 2 Wils. 341.

(*c*) *Green* v. *Price* (1845), 13 M. & W. 695.

(*d*) Co. Litt. 206 a, 209 a; Bro. Ab. tit. *Condition*, pl. 127; 2 Bl. Com. 341; Shep. *Touch.* 157.

On the forfeiture of the bond, the whole *penalty* was formerly recoverable at law: but courts of equity would not permit a man to acquire any collateral advantage from the bond,—as, *e.g.*, to take more than his principal, interest, and costs, where the bond was conditioned for the payment of money; or to recover more than the amount of the damage actually sustained, where the bond was conditioned for the performance of (or abstention from) some act. With respect to *common money bonds*, this principle of equity was in due course introduced into the practice of the courts of law; and such practice was afterwards confirmed by statute (*e*). On the same equitable principle, with respect to bonds conditioned for the performance of (or abstention from) some act, it was enacted by the statute 8 & 9 Will. III. c. 11 (the provisions of which act were recognised and preserved by The Common Law Procedure Act, 1852, and are adopted into the new practice under the Judicature Acts) that in every action upon a bond of that character, the jury shall inquire of the damages which the plaintiff has actually sustained from the breach of the condition; and though (for his better security in the event of any future breach) he is still in such a case allowed to enter up *judgment* for the whole penalty, yet he is prevented from taking out *execution* to a larger amount than the damages which the jury had assessed (*f*). In the case of a *common money bond*, a claim can be made by specially indorsed writ under Order 3, rule 6 of the Rules of the Supreme Court (*g*).

Contracts secured by penalties are of an analogous character, being covenants to do (or abstain from doing) certain acts, the covenant providing that, in the event of its being broken, the covenantor shall pay to the covenantee a sum of money; and upon contracts of this nature, the question usually arising is, whether the sum shall be considered as a penalty, or as liquidated damages. This is a distinction of considerable importance, because if

(*e*) 4 & 5 Anne, c. 3.
(*f*) R. S. C., O. xiii., r. 14.
(*g*) *Gerrard* v. *Clowes*, [1892] 2 Q. B. 11.

the sum is a penalty, then the covenantee is compelled to limit his *execution* to the amount of the damages which the jury shall have assessed; but if the sum is liquidated damages, he is entitled to judgment (and also to execution) for the entire sum, the parties themselves being in that case deemed to have settled and agreed the damages.

The question whether, in any particular case, a given sum is a penalty or is liquidated damages, is often difficult to determine, depending (as it does) partly upon the nature and terms of the contract itself, and partly upon considerations of equity. If the sum is expressed and intended by the parties themselves to be a penalty, the court will always so regard it; but the expressed intention of the parties to stipulate for liquidated damages is not conclusive of their real intention. For if the sum appears to be essentially a penalty, the law will so construe it in disregard of the expressed intention (*h*). Therefore, where the agreement is to pay a certain sum of money, with a proviso for the payment (in case of default) of a much larger sum of money by way of liquidated damages, the larger sum will be treated as a penalty (*i*). Where a contract contains a variety of provisions, and provides for the payment of a specified sum by way of liquidated damages, upon breach of *all* or *any one* of the provisions, that sum will be held a penalty (*k*). On the other hand, where a sum is agreed to be paid as compensation for doing or not doing some one particular act, *e.g.*, where a man engages with a woman to marry nobody but her, and (on marrying with any other woman) to pay her 1,000*l.*, the party will usually be entitled to judgment and execution for the entire sum, as liquidated damages (*l*).

(*h*) *Lord Elphinstone* v. *Monkland Iron Co.* (1886), L. R. 11 App. Ca. 332; *Wallis* v. *Smith* (1882), 21 Ch. D. 243.

(*i*) *Hatton* v. *Harris*, [1892] A. C. 547.

(*k*) *Willson* v. *Love*, [1896] 1 Q. B. 626.

(*l*) *Lowe* v. *Peers* (1768), 4 Burr. 2225; *Law* v. *Redditch Local Board*, [1892] 1 Q. B. 127.

CHAPTER V.—SECTION IX.

OF BILLS OF EXCHANGE, AND PROMISSORY NOTES.

BILLS and notes are a species of written mercantile instruments by which men enter into contracts for the payment of money; and the whole law regarding these has been codified by the Bills of Exchange Act, 1882. We shall consider, first, Bills: and secondly, Notes.

(1.) BILLS OF EXCHANGE:—These were originally invented for the more easy remittance of money from one country to another, but are now of almost universal use in all pecuniary transactions. A bill of exchange is defined by the Bills of Exchange Act, 1882, as "an "unconditional order in writing addressed by one person "to another, signed by the person giving it, and requiring "the person to whom it is addressed to pay on demand, "or at a fixed or determinable future time, a sum certain "in money to, or to the order of, a specified person or "the bearer." Where the specified person (payee) is a fictitious or non-existing person, the bill is (in effect) payable to bearer (*a*).

A bill of exchange is frequently called a *draft*; the person who makes it is called the *drawer*; the person on whom it is made is called the *drawee*; and the person in whose favour it is made is called (when a third person) the *payee*. But the drawer and the payee may be (and very commonly are) one and the same person.

Bills of exchange are either *inland* or *foreign*,—an *inland* bill being one which is, or on the face of it purports to be, drawn and payable within, or drawn there upon any

(*a*) Section 7 (3); *Clutton* v. *Attenborough*, [1897] A. C. 90.

person resident within, the United Kingdom (which for this purpose includes the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the king's dominions) (*b*). A *foreign* bill is any other bill, that is to say, a bill which is either drawn by a person residing abroad upon some person within the United Kingdom and made payable within the United Kingdom, or *vice versâ*; or which is both drawn and payable abroad (*c*). Formerly, foreign bills of exchange were much more regarded in the eye of the law than inland ones, being thought of more public concern in commerce; but for a very long time there has not been any difference between them as regards their material legal incidents,—although of course, in minor matters (*e.g.*, as regards stamps, etc.), there are still certain differences.

A bill of exchange, payable *to bearer* or *to order*, is said to be *negotiable*—a term which in law is applicable to any instrument the right of action on which is, by exception from the common rule, freely assignable from man to man, either by simple delivery or (as the case may require) by indorsement coupled with delivery (*d*). The indorsement of a bill consists in writing one's name on the back thereof; and such indorsement may be either in *blank*, or else *in full*, or *special* (sections 32—34). It is *in blank*, if the payee simply writes his own name; *in full*, if he writes "pay X. or order," and signs his own name thereto,—but in either case he delivers over the bill so indorsed (section 21). The first *indorsee* may in like manner indorse to another, and so on, *in infinitum*, until the bill is due, and even when it is overdue; but an overdue bill is no longer strictly negotiable (s. 36). If the bill be payable simply to a person named, *and to him only*, and not to order, or to bearer, it

(*b*) Section 4.

(*c*) Section 8; *Colonial Bank* v. *Cady* (1890), L. R. 15 App. Ca. 267.

(*d*) *Goodwin* v. *Robarts* (1875), L. R. 10 Ex. 337; 1 App. Ca. 476; *London Joint Stock Bank* v. *Simmonds*, [1892] A. C. 201.

is not negotiable at all; and, on the other hand, if made payable to *bearer*,—as is often the case with that species of bill which is called a *cheque on a banker*,—it is negotiable without any indorsement, and by mere delivery; and the case is the same where a bill, which was originally payable to order, has been indorsed *in blank* by the payee. But note, that although an instrument may be negotiable by the law of a foreign country, it is not necessarily negotiable also in this country (*e*); also, that post-office orders and postal orders are not negotiable (*f*), although, for purposes of collection, they may be (and very commonly are) indorsed to a banker. An instrument can only be or become negotiable, by statute or by custom of merchants (*g*).

With regard to crossed cheques (including "stock dividend warrants"), it has been provided, by the Bills of Exchange Act, 1882, ss. 76—82, re-enacting with amendments the like provisions contained in the Crossed Cheques Act, 1876, as follows, that is to say:—(1.) That when a cheque is crossed "generally" (*i.e.*, without naming any particular banker to whom it is to be paid), the banker on whom it is drawn shall not pay it otherwise than to a banker; and where it is crossed "specially" the banker shall pay it only to the particular banker to whom it is crossed, or to his agent for collection: (2.) That where a banker has, in good faith and without negligence, paid according to its tenor a cheque, crossed either "generally" or "specially," both he and (if the cheque has come into the hands of the payee) the drawer, shall be in the same position as they would respectively have been in, if the amount of the cheque had been paid to the true owner thereof. But, on the other hand, if

(*e*) *London and County Banking Co.* v. *London and River Plate Bank* (1887), 20 Q. B. D. 232.

(*f*) *Fine Art Society* v. *Union Bank of London* (1886), 17 Q. B. D. 705.

(*g*) *Goodwin* v. *Robarts*, *supra*; *Crouch* v. *Credit Foncier* (1873), L. R. 8 Q. B. 374.

the banker pays it otherwise than in accordance with its tenor, he is in such a case liable to the true owner for any loss the latter may sustain thereby (*h*); and (3.) That when a person takes a crossed cheque with the words "not negotiable," he shall not have (and not be capable of giving) a better title to the cheque than that which the person from whom he took it had.

When the time arrives at which a bill becomes payable, it is said to be *due*, or *at maturity*; but three days of grace are in such case allowed, and the bill is in general due and at maturity on the last of these three days. But no days of grace are allowed on a bill payable "on demand," or "at sight," or "on presentation"; *secus*, if payable so many days after demand, or sight, or presentation (*i*).

At any time before it becomes due,—and even (although not usually) after it becomes due,—the bill is presented to the drawee for his *acceptance*; and the drawee will in general accept the bill, although (in certain cases) he may lawfully refuse to accept it,—*e.g.*, where he owes nothing to the drawer, who therefore has no pretence of any title to draw upon him. And an acceptance, as to the manner of it, must be in writing on the bill itself, it being provided by sect. 17 of the Act of 1882 that no acceptance of any bill of exchange, whether inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, and signed by the acceptor or by some person duly authorized by him; but an acceptance will be sufficient if the acceptor merely writes his name across the face of the bill. A bill may be accepted either *generally* or *qualifiedly*, that is, as payable at some specified place, or subject to some condition or qualification. An acceptance at a banker's without words expressly stating that the bill is to be paid there only, is a general acceptance. After acceptance, any person, who, as payee,

(*h*) *G. W. Railway* v. *London and County Bank*, [1901] A. C. 414; *Gordon* v. *L. City and Midland Bank*, [1902] 1 K. B. 242.

(*i*) Section 14 of the Act of 1882.

or by transfer (whether before or after acceptance), is the holder of the bill at its maturity, is entitled to immediate payment *then* of the amount for which it is drawn, upon *presenting* it to the acceptor for *payment*. If under such circumstances the money be not then paid, the holder has a right to bring an action against the acceptor for the amount; or he may have recourse to the drawer, and to every person whose name is on the bill, as indorser, when it came to the holder's hands. For each of these parties is a guarantor for the payment of the bill, and it is on the credit of their names (though also on that of the acceptor, where it was negotiated after acceptance), that the holder is supposed to have taken the bill. The right of the holder, however, to have recourse to the drawer and indorsers, is subject to these conditions,—first, that he shall (except in certain cases specified in s. 46) have *presented* the bill to the accepting drawee *for payment*, on the precise day when it became due; and, next, that he shall have given reasonable *notice of dishonour*, that is to say, notice that it has not been paid. The notice, under ordinary circumstances, must, by s. 49 of the Act, be given on the following day; or if the persons to receive it do not reside in the same place as the payee, then by the post of that day. Notice must, by s. 48, be sent to all parties whom it is intended to charge, or at the least to him whose name was last placed on the bill, in order that the latter may advise the party next before him, and so in succession, each party being allowed, in turn, a day for the purpose. By ss. 14 and 92 of the Act if the day of payment of a bill (or the last day of grace, where days of grace are allowed) falls on a Sunday, Christmas Day, Good Friday, or any public fast day or thanksgiving day, the bill is considered to be due and payable on the last *preceding* "business day"; but if the day of payment or (as the case may be) the last day of grace, falls on a bank-holiday, the bill is considered to be due and payable on the next *succeeding* "business day," as it is also when the last day of grace

is a Sunday, and the second day of grace is a bank-holiday.

An indorser who is called upon and obliged to pay the bill, may in his turn have recourse to the drawer, or to any indorser prior to himself, provided such party shall have had due notice of dishonour; and the same right attaches successively to each indorser, in his turn. But the original payee has, of course, no prior party to resort to but the drawer; and the drawer can resort to no party but the acceptor, on whom rests in general, all the while, the primary liability. For the drawer, or any other party compelled to take up and pay the bill, is always entitled to look for satisfaction to the acceptor.

Presentment for acceptance is sometimes essential (ss. 39—41). The drawee may *refuse* acceptance of the bill; and the law will imply such refusal on his part, if he does not accept immediately on presentment, or within twenty-four hours after the bill is left with him for acceptance (*j*). On such refusal, the holder of the bill becomes apprised, of course, that the bill is no bill at all, so far as the drawee is concerned; and he is therefore entitled to charge the other parties, viz. the drawer and prior indorsers (if any), and to charge them *instanter*, as liable to immediate payment, though the bill has not yet arrived at maturity (*k*). But to justify any recourse against these parties, notice of the non-acceptance must be given to them, according to the same law and course of proceeding that was before stated with reference to giving notice of dishonour for non-payment; and such of them as are consequently obliged to take up the bill are entitled, as in that case, to their remedy over against all prior parties (*l*).

The holder may, however, take his chance that the bill may, notwithstanding the refusal to accept, be ultimately

(*j*) Section 42. (*k*) Section 43. (*l*) Section 48.

paid by the drawee; and may accordingly present it to him for that purpose when it comes to maturity, without thereby waiving his right of recourse against the other parties (*m*). For generally, it is at the option of the holder, whether he will present the bill for acceptance or not, the object of such presentment being only to ascertain whether the bill is likely to be paid by the acceptor, and to strengthen its credit, if possible, by the additional security of the latter's name; though if a bill be (as it often is) drawn payable at a specified period *after sight* or *after demand*, a presentment for acceptance is in that case indispensable, in order to give sight to the drawee, or to make demand upon him, and thereby to fix the time at which the bill is to become due (*n*).

Independently of the notice of non-acceptance or of non-payment, the holder is also entitled to have the bill, of which either acceptance or payment is refused, *protested*. The *protest*—which is a formal declaration that the bill has been refused acceptance or payment, and that the holder intends to recover all the expenses to which he may be put in consequence thereof—must be made in writing under a copy of such bill of exchange, by some notary public; or if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses (*o*). In the case of a foreign bill, such protest is essential to the right of the holder to recover from the drawer or indorsers; and when made, due notice of dishonour having been also given, the protest will entitle the holder to recover the amount of the bill, with interest, and all expenses, including the re-exchange, occasioned by returning it to the country where it was drawn, together with interest on such re-exchange (*p*). But upon an inland bill, the principal and interest may be recovered from these parties (due notice

(*m*) Section 48.
(*n*) Section 39.
(*o*) Section 51.
(*p*) Section 57.

being given) without a protest, which is indeed a ceremony not usually observed with respect to inland bills.

A bill, of which acceptance has been refused by the drawee, is sometimes "*accepted supra protest*," that is to say, for the *honour of the drawer* or (as the case may be) *for the honour of the indorser*; that is, some friend of the drawer (or indorser) intervenes, to prevent the bill from being sent back upon him as unpaid, by placing his own name upon it as acceptor, after a protest has been drawn up declaratory of its dishonour by the drawee (*q*). Where an acceptance for honour does not express for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer. An acceptance *supra protest*, or for honour, operates, not as an absolute engagement to pay, but only as an engagement to pay in the event of the bill being presented, dishonoured and protested upon subsequent presentment for payment to the drawee, when it arrives at maturity, and of its being afterwards duly presented for payment to the "acceptor for honour," with due notice of these facts. On these conditions being fulfilled, the latter is then absolutely liable, as if he had accepted in the capacity of drawee, so far as regards the claim of any person whose name stands subsequent to his for whose honour the acceptance was made; while, on the other hand, such an acceptor, upon being obliged to pay, has a right of recourse against the person for whose honour he accepted, or against any party antecedent to him in the series of names (*r*). A bill which has been protested for non-payment may be *paid* by some third person "*for honour supra protest*," the result being similar to the case above mentioned (*s*).

(2.) PROMISSORY NOTES.—By the Bills of Exchange Act, 1882, s. 83, a note is defined as "an unconditional promise

(*q*) Section 65.
(*r*) Sections 66, 67.
(*s*) Section 68.

" in writing made by one person to another, signed by the " maker, engaging to pay on demand, or at a fixed or deter- " minable future time, a sum certain in money, to or to the " order of a specified person, or to bearer." These instruments (if payable to order or bearer) were, by the statutes 3 & 4 Anne, c. 8, and 7 Anne, c. 25, placed upon the same footing, as to negotiability and otherwise, with inland bills of exchange, so that almost every point of law which applies to the one may be taken generally as applicable also to the other ; with only this difference, that, as a note is originally made between but two parties, viz., the maker and the payee, (there being no third party, or drawee, as in the case of a bill,) all those legal incidents of a bill which regard the position of the drawee, and the nature and effect of an acceptance, are of course foreign to a note (*t*). The maker of the note stands, in fact, in the place of both drawer and acceptor. He is the party in every case primarily liable ; and to him, accordingly, the holder presents the note in the first instance for payment, when it arrives at maturity. On his failure to pay, the holder may then resort to the indorsers, each of whom has a successive right of recourse against the names anterior to his own, leaving to the first indorser, or original payee, no remedy except against the maker himself. And there is this further difference to be observed between bills and notes, namely, that a note, if made payable at any specified place, must be presented *there* for payment, though the restrictive negative words "and not elsewhere" should not have been added (*u*).

Bills of exchange and promissory notes (as compared with other contracts) have, as "*negotiable* instruments," some legal properties of a peculiar kind. *First*, although choses *in action*, a " holder in due course " (*i.e.*, a *bonâ fide* indorsee for value) takes them free from the equities affecting them in the hands of the assignor. So much so

(*t*) Section 89. (*u*) Section 87.

that, though by the general rule of law a party can give no better title to a thing personal than he himself has, yet he who has obtained by wrongful means, or even by felonious means, the possession of a bill or note drawn payable to order and indorsed *in blank*, or drawn payable to bearer, is competent to make a valid transfer of the instrument and its contents, by merely delivering it for valuable consideration to a person unaware of the defect in his title (*x*). In this particular, the instruments in question—and indeed all others of a negotiable kind, which are transferable by *mere delivery* (with or without indorsement)—are, for the benefit of commerce, placed upon the same basis with the current coin of the realm; which (as we have already had occasion to observe) passes freely from man to man, without regard to any defect in the title of him who pays it over, provided it be paid for valuable consideration, to an innocent party (*y*). Even where the bill or note is paid upon a forged indorsement, the money paid to a holder in due course cannot be recovered back (*z*). This is a convenient place to observe that, by an express provision contained in section 60 of the Bills of Exchange Act, 1882, a banker who, in the case of a draft or order upon himself, pays the amount thereof in good faith and in the ordinary course of business to the purported indorsee or bearer, is not liable to make good to his own customer the amount so paid away, although it should be afterwards shown that the indorsement was a forgery. But in all other cases of a wrongful payment by a banker (as such), the bank is the loser, and cannot charge its own customer with the amount paid; unless, of course, the customer by his own negligence has caused the wrongful payment (*a*).

Secondly, although in other cases of simple contract the

(*x*) Sections 29, 54, 55.

(*y*) *Vide supra*, p. 53.

(*z*) *London and River Plate Bank* v. *Bank of Liverpool*, [1893] 1 Q. B. 7.

(*a*) *Vagliano* v. *Bank of England*, [1891] A. C. 107.

party who sues thereon for the breach of contract, is obliged to prove the *consideration* on which the promise was made, and on failure of such proof will be defeated, yet no evidence of the consideration is required from the holder of a bill or note, for he is in general called upon to prove nothing beyond the signature thereto of the party charged, every bill or note being deemed, in law, to carry with it, *primâ facie*, a sufficient consideration (*b*). If, however, the bill or note were shown to have been given for an *illegal* consideration, the holder would be required to prove that he gave value for it; and, even then, he might be defeated by proof that he was aware of the illegality when he took it (*c*). And a party known as an "*accommodation* "*party*" who, in fact, receives no consideration for a bill, is not liable on the bill to any other party, except a holder for value, *i.e.*, a person who has either himself given value for it, or has taken the bill through some prior party who has given value for it (*d*).

Thirdly and lastly, any material alteration in a bill or note avoids the instrument (*e*); and this rule extends to Bank of England notes (*f*). But, by the Bills of Exchange Act, 1882, s. 64, an alteration that is "not apparent," does not avoid a bill or note in the hands of a holder in due course.

(*b*) Section 30; 2 Bl. Com. 446.

(*c*) *Bailey* v. *Bidwell* (1844), 13 M. & W. 73.

(*d*) Sections 28; and 27 (2).

(*e*) *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 753.

(*f*) *Suffell* v. *Bank of England* (1888), 9 Q. B. D. 555.

CHAPTER V.—SECTION X.

OF POLICIES OF LIFE AND FIRE INSURANCE; AND OF MARINE INSURANCE.

A POLICY of insurance is an instrument in writing by which one party, in consideration of a premium, engages to indemnify another against a contingent loss, by making him a payment in compensation, if and when the event happens by which the loss accrues. The effect of such a contract is obviously to protect the latter party (or the *assured*, as he is called) from the hazard to which he would otherwise be exposed, and to throw that hazard upon the *insurer*, or party giving the indemnity; who, if he carries on a general insurance business, by balancing the good against the bad, and by adjusting the premium as the circumstances seem to require, may not only himself escape loss, but may even secure for himself considerable profit from the result. Moreover, associations and other companies and corporations have been established for carrying on the business of insurance on a large scale; and the risks of any particularly heavy insurance are usually distributed among a great number of insurers. The losses most commonly insured against are those occasioned by the storms and perils of the sea, or by fire, or by death, which insurances are therefore called respectively marine insurances, fire insurances, and life insurances. But insurances may be (and at the present day very usually are) effected also against losses resulting from other accidental causes, as from burglary (*a*), accident, illness, and the like (*b*). And a valid insurance has been

(*a*) *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111.

(*b*) *Pugh* v. *L. B. & S. C. Rail. Co.*, [1896] 2 Q. B. 248.

effected even against loss sustained to a trading port through the attacks of foreign enemies therein (*c*) ; and insurances to secure the payment of debentures (*d*) are now in common use. But it is sufficient if we discuss the subject of insurance in its three principal branches already mentioned.

(1.) MARINE INSURANCE is said to have been originally introduced into this country by the Lombards in the course of the thirteenth century. The business of marine insurance is commonly undertaken by individuals or firms carrying on business in private partnership. A certain number of these persons or firms usually subscribe the instrument (or *policy*, as it is called), each engaging, on his or their own separate account, to indemnify the assured to the extent of a particular sum of money, being a proportion of the whole value of the subject of insurance ; and such persons are called, with reference to the method used of thus subscribing their names, *underwriters*. They belong, for the most part, to an association called " Lloyd's," the members of which underwrite each other's policies ; and the association, for better protecting its members against avoidable losses, is enabled (with the sanction of the Board of Trade) to establish signal stations and signal houses, and to arrange for telegraphic communication therewith (*e*). But marine insurances may also be made by bodies incorporated by private Act or charter ; or by limited companies established under the Companies Acts, 1862 to 1900. For although the Royal Exchange and London Assurance Companies at one time enjoyed, under certain statutes, a practical monopoly of the business of underwriting, this monopoly was abolished by the statute 5 Geo. IV. c. 114.

(*c*) *Carter* v. *Boehm* (1763), 3 Burr. 1905.

(*d*) *Finlay* v. *Mexican Investment Corporation*, [1897] 1 Q. B. 517.

(*e*) Lloyd's Signal Stations Act, 1888.

Special regulations have been made by the legislature relative to marine insurance, whether effected by companies or otherwise. Thus, in order to prevent inconvenience to the public from policies being made *in blank*—that is, without specifying the names of those for whose benefit, or on whose account, they are made—it has been provided by the Marine Insurance Act, 1788, that no policy of insurance on a ship or cargo shall be valid, unless there be inserted therein, before it is made or effected, the name or usual style of one or more of the persons interested therein; or if not, then of the consignor or consignee of the goods of which the cargo shall consist, or of the person in Great Britain who shall receive the order for or effect such policy, or of the person who shall give the order to the agent employed to negotiate or effect the same. Until a recent period, moreover, the practice of *re-insurance*, with reference to maritime insurance,—that is to say, a contract whereby an insurer seeks to relieve himself from a risk which he may have incautiously undertaken, by throwing it upon some other underwriter (*f*),—was forbidden by the law, except in certain specified cases (*g*); but the Marine Insurance Act, 1745, s. 4, by which this restriction was imposed, has been now repealed, so that such re-insurances are now freed from illegality, and are practically absolved from all restrictions. This contract of re-insurance must be distinguished from what is sometimes called the contract of *double insurance*; which is, where a person, being fully insured by one underwriter, effects another insurance on the same subject, with some other underwriter or underwriters. This contract was always held lawful; and the amount of the actual loss was recoverable by the assured against any or either of the underwriters. But, inasmuch as a marine insurance is a contract of *indemnity* only, the law will not allow the

(*f*) *Delver* v. *Barnes* (1807), 1 Taunt. 48.

(*g*) *Mackenzie* v. *Whitworth* (1876), 1 Ex. D. 36.

assured to recover anything beyond the single amount of his loss. And therefore, if he obtains full satisfaction upon either of his policies, he may not further proceed on the others ; but the underwriter who has paid is (like one of several co-sureties) entitled to contribution from the other underwriters who have underwritten the same loss (*h*). It is also to be observed that, by the Stamp Act, 1891, s. 93, no policy upon any ship, or upon any share therein, may be made for any certain term exceeding twelve calendar months ; and by the Policies of Marine Assurance Act, 1868, an assignee of the policy, provided he be beneficially interested therein, may sue on it in his own name.

The subject-matter insured is most usually the ship, or the cargo, or both, though it is also a common practice to insure the freight which the vessel is about to earn, or the profits expected from the cargo (*i*). The risks insured against are (unless excepted) usually the following :— perils of the seas, which comprise all the dangers on the sea incident to navigation (*k*) ; capture by a public enemy (*l*), or by pirates (*m*) ; fire (*n*) ; *jettisons*, that is, the voluntary throwing overboard of goods or merchandize, to ease the ship in time of danger or distress (*o*) ; arrests or embargoes laid on by public authority (*p*) ; and fraudulent conduct (or *barratry*) on the part of the master or mariners (*q*). Against all these risks the underwriters (in consideration of a premium paid down) severally

(*h*) *Davis* v. *Gilbert* (1777), Marsh. 140.

(*i*) *Camden* v. *Anderson* (1794), 5 T. R. 709.

(*k*) *Thames and Mersey Insurance Co.* v. *Hamilton* (1887), 12 A. C. 484.

(*l*) *Ruys* v. *Royal Exchange*, [1897] 2 Q. B. 135.

(*m*) *Dean* v. *Hornby* (1854), 3 El. & Bl. 180.

(*n*) *Woodside* v. *Globe Co.*, [1896] 1 Q. B. 105.

(*o*) *Royal Exchange Shipping Co.* v. *Dixon* (1887), L. R. 12 App. Ca. 11.

(*p*) *Robinson Gold Mining Co.* v. *Alliance, etc. Assurance Co.*, [1902] 2 K. B. 489.

(*q*) *Small* v. *United Kingdom Insurance Association*, [1897] 2 Q. B. 311.

engage to give their indemnity to the extent of a specified sum, during the particular voyage mentioned in the policy; and even if the vessel should have been lost at the time when the policy is executed (such fact being then unknown to both parties), the insurance is, by the ordinary form of these contracts, still binding,—it being the practice in our English policies to insure "*lost or not lost*," words not usually inserted in the insurances of other nations (*r*). But the voyage marked out in the policy must be always exactly pursued; for the slightest *deviation* from it, except under circumstances of absolute necessity, will render the insurance ineffectual, and that whether the loss be occasioned by the deviation or not, and whether the ship resume her proper course or not before the loss happens (*s*). Every marine policy, too, is made under an implied warranty, that the ship shall, at the time of her setting sail, be *seaworthy*, that is, in a condition to perform the voyage; and if the fact turns out to have been otherwise, the assured is not entitled to recover in the event of a loss, whether the loss have proceeded from the defects in her condition, or from any other cause (*t*).

The assured in a policy of marine insurance is entitled to claim upon the policy, not only where he is able to give direct proof of loss, but where he can show circumstances from which a loss may reasonably be presumed—as that a sufficient time has elapsed for receiving intelligence of the vessel since her departure, and that none has been received; for under such circumstances it will be inferred that she has foundered (*u*). But where direct proof of the calamity is given, it may turn out that the loss is either a *total*, or a *partial* loss (*v*); and a total loss may be either *actual* or

(*r*) *Sutherland* v. *Pratt* (1843), 11 M. & W. 296.

(*s*) *Hamilton* v. *Sheddon* (1837), 3 M. & W. 49; *Wingate* v. *Foster* (1878), 3 Q. B. D. 582.

(*t*) *Hedley* v. *Pinkney*, [1892] 1 Q. B. 64; *Re Margetts*, [1901] 2 K. B. 792.

(*u*) *Koster* v. *Reed* (1827), 6 B. & C. 19.

(*v*) *Roux* v. *Salvador* (1836), 3 Bing. N. C. 266; *Cossman* v. *West* (1887), L. R. 13 App. Ca. 160.

constructive. "*Total loss*" is said to be "*actual*," where the thing insured is absolutely destroyed, so as to remain no longer in specie, or where it is so damaged that it cannot ever arrive in specie at the port of destination (*x*). It is said to be "*constructive*," where the injury sustained is so great, as to make it reasonable that the assured should claim as for a total loss, leaving the underwriter to recover what he can out of the shipwreck or other calamity. And such constructive loss arises, whenever the nature of the loss is such as to afford reasonable ground to the assured for relinquishing the voyage altogether, or where the goods are so damaged as not to be worth the expense of being forwarded (*y*). But in order to claim as for a total loss, when in fact it is so by construction only, the assured is bound formally to cede or *abandon* all his remaining right in the property to the underwriter ; and unless *notice of abandonment* be given within a reasonable time after intelligence of the circumstance is received, the loss will be treated as partial only (*z*). In every case of *partial* loss, the underwriter is liable to pay such proportion of the sum he has subscribed, as the damage sustained by the subject of insurance bears to its whole value at the time of insurance ; but in the case of a *total* loss, he is liable for the entire amount of his subscription (*a*).

Also, by a clause usually introduced into marine policies, they are commonly made to extend to indemnifying the assured against *salvage*, that is, against payments properly made for the defence, safeguard, or recovery of the ship or goods, and also against *general average*, which latter subject requires a more particular consideration. The term *general* average (otherwise, but not usually, called *gross* average) expresses the contribution which, by the

(*x*) See note (*v*) *supra*, p. 163.

(*y*) *Moss* v. *Smith* (1850), 9 C. B. 103.

(*z*) *Roux* v. *Salvador*, *supra* ; *Currie* v. *Bombay Insurance* (1869), L. R. 3 P. C. 72.

(*a*) *Lewis* v. *Rucker* (1761), 2 Burr. 1172.

maritime law of every country in Europe, is made by the general body of proprietors of the ship or cargo, towards the loss sustained by any individual of their number, whose property has been intentionally sacrificed for the common safety ; as where, in a storm, jettison is made of any goods, or sails or masts are cut away, *levandæ navis causâ* (*b*). But to found this obligation, it is essential that the ship should be eventually saved ; and that the sacrifice so made should have in fact conduced to her preservation, and also that the cargo so jettisoned was laden in a proper manner. For goods stowed upon the deck (unless where a special custom authorises deck stowage) are not the subject of general average (*c*). By our law, not only the ship and cargo, but also the freight, is liable to contribute to a general average. The way of settling the contribution among the several parties, on the arrival of the ship at the port of destination, is to ascertain the proportion that the value of the property sacrificed bears to the entire value of the whole ship, cargo, and freight,—such estimate being made according to the net value of the several articles, if there brought to sale,—and to make the property of each owner (including the property sacrificed) contribute to the common loss, in the proportion so found. A party obliged to make payment of such quota to the owner of the property sacrificed, is entitled, upon the ground already stated, to seek, in his turn, compensation from the underwriters with whom he may have effected an insurance upon the property liable to the contribution. This contribution is the payment against which the policy (where it includes general average) extends to indemnifying the assured ; and the mutual contributions are settled by the award of persons called *average adjusters* or *staters* (*d*).

(*b*) *Strang* v. *Scott* (1889), L. R. 14 App. Ca. 601.

(*c*) *Wright* v. *Marwood* (1881), 7 Q. B. D. 62.

(*d*) *Wavertree Co.* v. *Love*, [1897] A. C. 373.

(2.) FIRE INSURANCE.) —A *fire policy* engages, that,
(3.) LIFE INSURANCE.) in consideration of a single premium or (as the case may be) periodical payments of premiums, the company will pay to the assured compensation for such loss as may occur by fire to his specified property within a certain period, to an amount not exceeding a particular sum fixed for that purpose by the policy.

A *life policy* usually engages, that, in consideration of a single premium or (as the case may be) a number of periodical premiums, the company will pay, on the death of some individual, or on his death within a limited period, a certain sum of money therein specified ; that is, will pay it to the party effecting the insurance (supposing it to be effected by a stranger having an interest in the life insured), or to the executors or administrators of the party whose life is insured, supposing him to effect it for his own benefit. Under the Policies of Assurance Act, 1867, s. 1, any person becoming entitled to a life policy by assignment or other derivative title, and having a right in equity to give an effectual discharge to the insurance company, is enabled on giving notice of such assignment to the company, to sue on the policy in his own name, as soon as it becomes a claim.

By the Life Assurance Companies Acts, 1870 to 1872, certain provisions are made for securing the solvency of life insurance societies, in particular, by requiring every society to deposit in court a sum of 20,000*l*. By the Companies Act, 1862, s. 44, every insurance company is bound to publish twice a year a full statement of its capital, and its assets and liabilities.

Insurable interest.—It is a rule regarding all insurance contracts, whether against fire, or on life, or against loss at sea, that the assured must have an "*insurable interest*" in the subject-matter thereof (either in his own right or at least as a trustee), equal to the amount of the sum insured. Beyond the extent to which he possesses such interest, the contract will not be effectual ; and the interest must

be one of a pecuniary kind (*e*). A practice nevertheless formerly obtained in *marine* insurances, of insuring large sums without having any property on board, which were called insurances "interest or no interest" (*f*); and though the policies in such cases amounted obviously to a species of wager, yet there was nothing at the common law which prevented their taking effect according to the design of the parties, that is, as wagers, although not as policies. But it was thought proper to repress these wagering bargains by positive regulation, and the Marine Insurance Act, 1745, accordingly enacted, that all insurances on British ships or goods (*g*), "interest or no interest," or without further proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, should be totally void, subject only to certain exceptions in the Act specified. As regards policies of insurance generally, it has been enacted by a later statute, namely, the Gambling Act, 1774, that no insurance shall be made on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose benefit, or on whose account, such policies are made, have no interest, or by way of gaming or wagering; and every insurance so made is rendered void. It is also unlawful to make any policy, without inserting therein the name of the person interested, or for whose use, benefit, or account it is made (*h*); and no greater sum may be recovered from the insurer than the amount of the interest of the assured, in the life or lives, or other event or events. But with reference to *life* policies, a man has always been considered as having an interest in his own life (though not in that of his wife

(*e*) The Marine Insurance Act, 1745, and the Gambling Act, 1774; *Hebdon* v. *West* (1862), 3 B. & S. 579; *Dalby* v. *India, etc. Assurance Company* (1855), 15 C. B. 365; *Inglis* v. *Stock* (1885), L. R. 10 App. Ca. 263.

(*f*) 2 Bl. Com. 461.

(*g*) *Berridge* v. *The Man On Insurance Company* (1887), 18 Q. B. D. 346.

(*h*) *Hodson* v. *Observer Life Assurance Company* (1858), 8 El. & Bl. 40.

or child), of a kind that justifies his effecting an insurance upon it to any amount (*i*) ; and a policy effected on the life of one's debtor has always been valid to the extent of the amount of the debt. It has, moreover, been decided (*k*), that a policy on the life of another, in which the assured was interested at the time of effecting the policy, is not invalidated by the Act of 1774, merely because such interest has ceased before the death; and it has also been decided (*l*), that in the case of an insurance against accidents, the assured may recover, on the accident policy, the full amount of his insurance, though he shall also have recovered damages against the party by whom the accident was caused. It is further to be observed, that, under the Married Women's Property Act, 1882, a husband may insure his own life expressly by way of trust for the benefit of his wife and children, and (subject thereto) for his own benefit ; also, that a wife may effect a policy either on her own life or on that of her husband (*m*), for her own benefit, or that of herself and her children. In every such case the policy moneys do not, so long as any object of the trust remains unperformed, form part of the assured's estate, or become subject to his or her debts.

Under the Life Assurance Act, 1896, an insurance company can pay policy moneys into court, "if in the opinion of the board of directors no sufficient discharge can otherwise be obtained."

Any *misrepresentation* of fact, on the part of the assured (whether made by himself or by his agent without his knowledge), upon a point material for the insurer's guidance in estimating the risk, will, as in the case of other contracts, discharge the latter from his liability ; and this

(*i*) *Halford* v. *Kymer* (1830), 10 B. & C. 729.

(*k*) *Dalby* v. *The India and London Life Assurance Company* (1855), 15 C. B. 365.

(*l*) *Bradburn* v. *Great Western Railway Company* (1874), L. R. 10 Exch. 1.

(*m*) *In re Davies' Policy*, [1892] 1 Ch. 90.

is so, whether the loss which actually happens has any connection with the matter misrepresented or not (*n*). And, insurance contracts being contracts *uberrimæ fidei*, mere *concealment* of any circumstance of the like description, vitiates the policy, provided it were known to the assured at the time of effecting the policy (*o*). Finally, it may be observed, that where a policy is void *ab initio*, from a cause *not amounting to fraud or illegality* on the part of the assured—as where, in a marine insurance, the ship, though believed to be seaworthy, turns out not to have been so, contrary to the implied warranty on that subject, or sails alone, contrary to an express warranty to sail with convoy,—the insurer is bound in every such case to refund the premium; for he was never legally in risk, and therefore cannot retain the consideration (*p*). But where, on the other hand, a policy is void *ab initio* for *illegality*, or is voidable for *fraud*, the assured cannot reclaim even the premium, the mutuality of the fault making no difference; for in this latter class of cases the maxim applies,—*in pari delicto, potior est conditio possidentis* (*q*).

(*n*) *Blackburn* v. *Vigors* (1887), L. R 12 App. Ca. 531; *Blackburn* v. *Haslam* (1888), 21 Q. B. D. 144.

(*o*) See above, p. 86; *London Assurance* v. *Mansel* (1879), 11 Ch. D. 367; *Seaton* v. *Burnand*, [1900] A. C. 135.

(*p*) *Tyrie* v. *Fletcher* (1777), 2 Cowp. 666.

(*q*) *Morck* v. *Abel* (1802), 3 Bos. & P. 35; *Chapman* v. *Fraser* (1793), Marsh. 525.

CHAPTER V.--SECTION XI.

OF CHARTERPARTIES AND BILLS OF LADING.

CHARTERPARTIES are instruments in writing (with or without seal), between a merchant and a shipowner, for the hire of an *entire* vessel at a freight or reward agreed on, either for a particular voyage or voyages or for a specified period of time. Upon the execution of such an instrument, the ship is said to be *chartered* or *freighted*, and the party by whom she is engaged is called the *charterer* or *freighter*. But where, instead of taking the entire vessel, the owner of goods merely bargains for their conveyance, for freight, by any particular vessel (other goods being at the same time conveyed in her for other owners), she is described, not as a chartered but as a *general* ship; and in this latter case, no charterparty is usually executed, but merely a *bill of lading*. The shipowner in the latter case is merely a carrier, and is subject to the ordinary law of carriers, except so far as his duties and liabilities are specially provided for by the Merchant Shipping Act, 1894, and other statutes (*a*).

A *bill of lading* fulfils three functions in law. (1) It is an acknowledgment of or receipt for the goods shipped under it (*b*); (2) it constitutes the contract for carriage of the goods, and sets forth the terms and conditions by which the parties are bound (*c*); and (3) it is a document of title to the goods, so that indorsement and delivery of

(*a*) *Vide supra*, p. 127.

(*b*) Bills of Lading Act, 1855, s. 3; *Parsons* v. *New Zealand Co.*, [1901] 1 K. B. 548.

(*c*) Bills of Lading Act, 1855, *Leduc* v. *Ward* (1888), 20 Q. B. D. 479.

it to a purchaser operates to transfer to him the ownership in the goods (*d*).

A *charterparty* is commonly made between the owner or the master of the ship (as the case may be) on the one part, and the owner of the goods on the other, and purports to be an agreement, that the ship shall be employed in the conveyance of goods for a certain voyage (or for a certain period of time), at a certain amount of freight, calculated at so much per ton, or at so much per month during the voyage. It also usually engages, First, *on the part of the ship-owner or master*, that, being seaworthy and provided with necessaries, the ship shall receive a full cargo on board, not exceeding what she can reasonably carry; that the same shall be properly stowed; and that the ship shall then immediately sail (wind and weather permitting) on the specified voyage, and that the cargo shall be delivered (subject to certain preventing causes) at the port of destination, to the charterer or his assignees, in as good order as it was received on board; and, Secondly, *on the part of the charterer*, that he will supply a full cargo, and load and unload the goods within a certain number of days (usually called *lay* or *running* days), and pay freight as agreed upon; and that, if he detains the vessel beyond the running days, he will also pay *demurrage*, that is, a certain amount *per diem* for the whole period of such extraordinary detention (*e*).

In the performance of this contract, it is the duty of the ship-owner or master to take good care of the cargo during the voyage; and the ship-owner will be liable to make satisfaction for any damage resulting from the master's negligence in this respect or for the loss or non-delivery of any of the goods of which the cargo consists, unless occasioned by causes within the exceptions of the charter-party. Under the ordinary exceptions, the ship-owner,

(*d*) See above, p. 50, *Sewell* v. *Burdick* (1884), L. R. 10 App. Ca. 79: Bills of Lading Act, 1855, s. 1.

(*e*) *Saxon Steamship Co.* v. *Union Steamship Co.* (1901), 83 L. T. 106.

if he has acted with reasonable care, is protected from liability for loss or delay arising from "the act of God, "the king's enemies, restraint of princes and rulers, fire," and perils of the sea of all kinds (*f*). If the goods arrive safely, the ship-owner or master is not bound to deliver them (unless there be some stipulation to that effect), unless and until he receives payment of the freight; for there is in general a lien on the goods for the freight, and the delivery and payment are considered in law as contemporaneous.

If the ship-owner or master, being prevented by an accident for which he is not responsible from entirely performing his contract, yet performs it in part, by carrying the cargo safely during a certain portion of the voyage, and the charterer receives the benefit of such part performance, freight will then be due *pro ratâ itineris*. Thus, if the cargo be captured by an enemy during the voyage, and be retaken, and ultimately come to the charterer's hands; or if the ship be lost by stress of weather before the termination of the voyage, and the cargo be voluntarily accepted by the owner of it at an intermediate port; he will be liable to pay the owner of the chartered vessel freight *pro ratâ*, that is, an amount proportioned to the distance for which the goods have been carried (*g*). This right is founded, not on the charter-party, but on the contract which the law *implies* in every case where a service has been rendered, viz., that the party who consents to take the benefit of it, shall pay in respect thereof as much as it is reasonably worth, or, in other words, shall pay as upon a *quantum meruit*.

(*f*) *The Xantho* (1887), L. R. 12 App. Ca. 510.

(*g*) *The Soblomsten* (1866), L. R. 1 Ad. & Ec. 297; *Metcalfe* v. *Britannia I. W.* (1877), 2 Q. B. D. 423.

CHAPTER V.—SECTION XII.

OF DEBTS AND CHOSES IN ACTION.

THE meaning of, and distinction between, *choses in possession* and *choses in action* has already been dealt with in a previous chapter (*a*). The subject of *choses in action* is, however, so important, that it is desirable to consider it more fully. Although in its original sense, a *chose in action* meant merely any right to things personal out of one's possession, in modern times the expression is, ordinarily, extended to rights to any act or forbearance due under a contract, and in particular to the payment of money. The most familiar instances of *choses in action* are, therefore, ordinary debts, stocks and shares in companies, and negotiable instruments. It is not necessary in this part of the work to deal specially with the subject of stocks and shares; but it is proposed to consider the other instances mentioned in some detail.

Debts and other *choses in action* were not at common law assignable. If a person assigned a chose in action to another, the latter could not in his own name sue the debtor. An assignment could only be made by consent of the debtor, so as in effect to amount to a novation of the debt. The obligation between debtor and creditor was regarded as a personal one, and, in addition to this fact, a *chose in action*, being an intangible thing, had only a notional existence, and it was regarded as impossible to transfer possession of it, and therefore impossible to assign it effectually at all (*b*). To this technical rule of the

(*a*) See *ante*, p. 6.

(*b*) *Lampet's Case* (1613), 10 Rep. 48 a; *Miller* v. *Race* (1791) 4 T. R. 340.

common law there were a few exceptions, *i.e.*, (1) the Crown could assign its choses in action ; (2) assignments by operation of law were valid, *e.g.*, on marriage, death, or bankruptcy ; (3) annuities were assignable (*c*) ; (4) by the law merchant, which was in effect part of the common law, bills of exchange, cheques, and exchequer bills to bearer, could be assigned.

Further exceptions in particular cases grew up by statute ; for instance, promissory notes by Acts of Queen Anne's reign, bail bonds, replevin bonds, mortgage bonds, bills of lading (if indorsed), mortgage debentures, East India bonds, policies of life and marine insurance, and shares in companies.

Quite apart from statute altogether, many *choses in action* could, and can still, be assigned *in equity*. The Court of Chancery, from a very early date, would recognise as valid, and give effect to, such an assignment, and would allow the assignee, in his own name, to sue the debtor. An equitable assignment, however, *semble*, had to be for value (*d*) ; notice of it had to be given to the debtor in order to render it effectual *against him* (*e*) ; and the assignee obtained no better title than the assignor, but took the *chose in action* subject to any equitable rights of other persons affecting it at the time of the assignment, whether he had notice of such rights or not, unless there existed some estoppel precluding such persons from setting up equities (*f*). The effect of an equitable assignment varied according to the nature of the *chose in action*

(*c*) Co. Litt. 144 b, note 1 by Hargrave.

(*d*) *Ward* v. *Audland* (1844), 8 Beav. 201 ; *Tailby* v. *Official Receiver* (1887), L. R. 13 App. Ca. 543 ; but see *Harding* v. *Harding* (1886), 17 Q. B. D. 442, and articles in the Law Quarterly Review, vol. xvi., p. 241 ; and vol. xvii., p. 90.

(*e*) *Bence* v. *Shearman*, [1898] 2 Ch. 582 ; *Ward* v. *Duncombe*, [1893] A. C. 369 ; *Re Patrick*, [1891] 1 Ch. 82, 87.

(*f*) *Ord* v. *White* (1840), 3 Beav. 357 ; *Hooper* v. *Smart* (1875), 1 Ch. D. 90 ; *Re Goy & Co.*, [1900] 2 Ch. 149.

assigned. If it was an *equitable* chose in action the assignee could sue in his own name so as effectually to bind the assignor; but if it was of a *legal* nature, he was required to join the assignor as a party to the action, in order to bind him by the decree. It was usual, in any case, for the assignor to appoint the assignee his attorney, to sue for the debt in the name of the assignor.

There are certain exceptional cases in which choses in action can neither in equity nor under the Judicature Act be effectually assigned, *i.e.*, (1) where the contract in question is purely personal; (2) where it contains an express provision against assignment; and (3) where the assignment is illegal or contrary to public policy (*g*).

A great change in the law was made by the Judicature Act, 1873, s. 25 (6), which provides, in effect, that any absolute assignment in writing of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, shall vest in the assignee the *legal* right to sue for and give a good discharge for the same, without the concurrence of the assignor, but subject to all prior equities. The following points must be carefully noted in connection with this provision. The effect is to give the assignee a complete *legal* right to sue in his own name (*h*). The conditions upon which the section operates are as follows: (1) The assignment must be "*absolute* and not by way of charge only." But this includes a mortgage in the ordinary form (*i*). (2) The assignment must be of a "*debt or legal chose in action.*" This seems to include all rights which could, previously to the Act, have been validly assigned either at law or in equity. It would not include the three exceptional cases above mentioned,

(*g*) Fry, *Specific Performance*, 3rd edition, §§ 224—233; *Griffith* v. *Tower Co.*, [1897] 1 Ch. 21; *Tolhurst* v. *Associated Portland, etc. Co.*, [1901] 2 K. B. 811.

(*h*) *Read* v. *Brown* (1889), 22 Q. B. D. 132.

(*i*) *Durham* v. *Robertson*, [1898] 1 Q. B. 765; *Hughes* v. *Pump House Co.*, [1902] 2 K. B. 190; *Re Kelcey*, [1899] 2 Ch. 530.

or a mere contract to lend money (*j*). (3) The assignment need not necessarily be for value (*k*). (4) The assignment must be "*in writing* under the hand of the assignor." (5) Express notice *in writing* must be given to the debtor (*l*). In equity notice in any form was sufficient. (6) The assignee, whether for value or not, takes subject to all equities subsisting against the assignor, whether he (the assignee) has notice of them or not (*m*).

It may be added that, if an assignment for some reason does not come within the scope of the section, it may, nevertheless, be enforceable as an *equitable* assignment, subject to the conditions applicable in such a case (*n*).

Negotiable Instruments.—A negotiable instrument is a document or instrument embodying, or constituting the title to, a debt or other chose in action, and differing from ordinary choses in action in the following material respects, *i.e.*, (1) the debt or chose in action to which it relates can be validly assigned by the mere delivery of the instrument accompanied, in certain cases, by indorsement; (2) no notice to the debtor of the assignment is required to entitle the assignee of the instrument to sue upon it (*o*); (3) a *bonâ fide* assignee for value, without notice of any defect in or equity affecting his assignor's title, gets an absolute title free from all defects and equities—in other words, he may get a better title than the assignor himself had; (4) the assignee can and always could, quite apart from the Judicature Act, 1873, sue upon the instrument in his own name (*p*).

(*j*) *May* v. *Lane* (1894), 64 L. J. Q.B. 237; *King* v. *Victoria Insurance Co.*, [1896] A. C. 250; *Jones* v. *Humphreys*, [1902] 1 K. B. 10.

(*k*) *Harding* v. *Harding* (1886), 17 Q. B. D. 442, and see note (*d*), p. 174, *ante*.

(*l*) *Dibb* v. *Walker*, [1893] 2 Ch. 429; *Marchant* v. *Morton*, [1901] 2 K. B. 829.

(*m*) *Re Jones*, [1897] 2 Ch. 203; *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511, 517.

(*n*) *Palmer* v. *Culverwell* (1902), 85 L. T. 758.

(*o*) *Bence* v. *Shearman*, [1898] 2 Ch. 582.

(*p*) See generally, *London Joint Stock Bank* v. *Simmons*, [1892] 2 A. C. 201.

Negotiable instruments can only arise in one of two ways, *i.e.*, (1) by statute, or (2) by custom of merchants. It would appear that such custom need not be ancient, so long as it has in fact by usage become well established (*q*). Express agreement is not sufficient to make an instrument "negotiable," though it may give rise to an estoppel which would prevent the party issuing it, and liable under it, from disputing the title of a *bonâ fide* holder for value (*r*).

There are many instruments which by mercantile custom have now become recognised as "negotiable," *e.g.*, bills of exchange and cheques (now governed by the Bills of Exchange Act, 1882); exchequer bills in blank; India bonds; foreign or colonial government scrip bonds and stock payable to bearer; share warrants of a limited company (probably); certain railway bonds to bearer; cedula bonds; and bankers' circular drafts (*s*). Debentures issued by a company may, it would also appear, become negotiable by custom (*t*).

Particular kinds of debts.—It is desirable, before concluding this section, to consider certain special classes of *debts*. In general, whenever a contract is such as to give one of the parties a right to receive a liquidated sum of money from the other—as in the case of a bond for payment of money, or an implied promise to pay for goods supplied so much as they shall be reasonably worth,—a debt is said to exist between these parties. But if the demand be of an uncertain amount,—as where an action is brought against a bailee, for injury done, through his negligence, to

(*q*) *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 381; *Goodwin* v. *Robarts* (1875), L. R. 1 App. Cas. 476; *Edelstein* v. *Schuler*, [1902] 2 K. B. 144.

(*r*) *Goodwin* v. *Robarts*, *supra*; *Bills Co.* v. *Tomkinson*, [1893] A. C. 396.

(*s*) See Willis, *Negotiable Securities*, where complete lists are given.

(*t*) *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein* v. *Schuler*, [1902] 12 K. B. 144.

the article committed to his care,—it is described, not as a *debt*, but as a claim for *damages* (*u*). As debts may thus arise out of contracts, and the contracts may be either specialty contracts or simple contracts, so the debts resulting therefrom are denominated either *specialty debts* or *simple contract debts*. Debts may arise, however, not only by deed or simple contract, but also by *matter of record*; and in that case, they receive the designation of *debts of record*, and include *judgment* debts, debts due upon a *statute merchant* or *statute staple* (now obsolete) and *recognizances*. With regard to *recognizances*, we may here observe that they are obligations of record, entered into before some court or magistrate duly authorised, whereby the party bound acknowledges that he owes to the Crown or (as the case may be) to a private plaintiff, a certain sum of money, with condition to be void if he shall do some particular act,—as if he shall appear at the assizes, keep the peace, pay a certain debt, or the like (*x*). Recognizances, when forfeited, are said to be *estreated* (that is, extracted or taken out from among the other records). Usually they are sent up to the Exchequer, to be enforced; but if ordered to be estreated by a court of *quarter sessions*, or of *gaol delivery*, then they are levied by the sheriff, and returned by the clerk of the peace to the Lords of the Treasury. Judgment debts are the most usual species of debts of record. When any sum is, in an action in any court of record, adjudged to be due from one party to the other, whether that sum was originally liquidated so as to constitute a *debt* between them, or was fixed and ascertained for the first time by the verdict of a jury or by the assessment of the judge himself, the claim having been originally in the nature of *damages*, it is said to be a judgment debt, and a debt of record.

(*u*) *Western Waggon Co.* v. *West*, [1892] 1 Ch. 277.

(*x*) Bro. Ab. tit. *Recognizance*, 24.

Debts may also result otherwise than from contracts and judgments; for if, by Act of Parliament, a penalty is annexed to some particular offence, and is made recoverable by the informer, any person committing the offence becomes indebted in the amount of the penalty to the informer, so soon as the information is laid. Again, a man who has never contracted at all to pay a rentcharge issuing out of land, may become liable therefor as for a debt, by reason of his having taken and enjoyed the land out of which the rentcharge issues (*y*).

(*y*) *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368; *Searle* v. *Cooke* (1890), 43 Ch. D. 519.

CHAPTER V.—SECTION XIII.

OF BILLS OF SALE.

THE subject of *Bills of Sale* has already been briefly referred to (*a*), but it is of such importance and complexity, that it has been thought advisable to deal with it separately in detail.

What are Bills of Sale.—The term "*Bill of Sale*," in its widest sense, really comprises any instrument in writing constituting a document of title to goods sold. Thus, the document of transfer of a British ship, required to be registered under the Merchant Shipping Act, 1894, is known as a "bill of sale."

In modern times, however, the expression is commonly used to indicate assurances within the scope of the Bills of Sale Acts, 1878, 1882, 1890 and 1891. In this sense, a "bill of sale" may be shortly defined as a document evidencing a sale or mortgage of personal chattels, unaccompanied by any actual transfer of possession of the chattels to the purchaser or mortgagee. The policy of the Acts above mentioned is, by means of a system of compulsory registration, to protect the rights of creditors against secret assignments of chattels, of which the assignor remains in the apparent possession (*b*).

Bills of sale, within the meaning of the Acts, are of two kinds, *i.e.*, First, *absolute bills of sale* in cases where chattels are absolutely sold to a purchaser, and Secondly, *bills of sale by way of security* in cases where chattels are

(*a*) See *supra*, bk. II., pt. II., ch. IV., pp. 50—53.

(*b*) See Lord BLACKBURN'S judgment in *Cookson* v. *Swire* (1884), L. R. 9 App. Ca. 664.

not sold out and out, but merely mortgaged to secure a loan. The Bills of Sale Act, 1878, applies to both kinds, and is the only Act governing *absolute* bills. The Bills of Sale Act (1878) Amendment Act, 1882, modifies the earlier Act so far as concerns bills *by way of security*, but does not apply to *absolute* bills (*c*). The Bills of Sale Acts, 1890 and 1891, have no general importance, their effect merely being to exclude from the operation of the principal Acts, instruments hypothecating or charging imported goods, during the interval between their unloading from a ship and their deposit in a warehouse, or reshipping.

Under the Acts of 1878 and 1882, the following instruments are or are "to be deemed to be" bills of sale requiring registration (*d*).

(1) "Bills of sale, assignments, transfers, declarations "of trust without transfer, inventories of goods with "receipt thereto attached, or receipts for purchase moneys "of goods, and other assurances of personal chattels."

But the instruments in all these cases must be documents "on which the title of the transferee to the goods "depends" (*e*).

(2) "Powers of attorney, authorities or licences to take "possession of personal chattels as security for any "debt" (*f*). But this would not extend to powers of distress in an ordinary lease (*g*), or to *bonâ fide* hiring or hire-purchase agreements (*h*).

(3) "Any agreement, whether intended or not to be "followed by the execution of any other instrument, by

(*c*) Act of 1882, s. 3; and see *Swift* v. *Pannell* (1883), 24 C. D. 210.

(*d*) Act of 1878, ss. 4, 5, 6.

(*e*) *Re Hood* (1893), 68 L. T. 391; *Re Roberts* (1887), 36 Ch. D. 196; *Newlove* v. *Shrewsbury* (1888), 21 Q. B. D. 41.

(*f*) *Re Roundwood Colliery Co.*, [1897] 1 Ch. 373.

(*g*) See and distinguish *Pulbrook* v. *Ashby* (1887), 56 L. J. Q. B. 376.

(*h*) *Ex parte Crawcour* (1878), 9 Ch. D. 419; *Beckett* v. *Tower Assets Co.*, [1891] 1 Q. B. 638; *McEntire* v. *Crossley*, [1895] A. C. 457.

"which a right in equity to any personal chattels, or to "any charge or security thereon, shall be conferred" (*i*). For instance, a clause in an agreement for the sale of a business and stock-in-trade, giving the vendor a lien or charge on the latter for his unpaid purchase-money (*k*).

(4) "Every attornment, instrument or agreement not "being a mining lease, whereby a power of distress is "given or agreed to be given by any person to any other "person by way of security for any present, future, or "contingent debt or advance, and whereby any rent is "reserved or made payable . . . for the purpose of "such security only" (*l*). But such documents are only within the Acts so far as they relate to "any personal "chattels which may be seized or taken under such power "of distress" (*m*).

The Act of 1878 expressly exempts from registration certain assurances and instruments (*n*), the chief of which are the following: Marriage settlements (*o*), assignments of ships, assignments for the benefit of creditors, bills of lading and dock warrants. And, by the Act of 1882 (sect. 17), debentures and debenture stock of a company are excepted from the operation of the Acts (*p*).

Finally, upon this part of the subject it may be observed, that the Acts do not affect a title to chattels acquired otherwise than in writing. They "avoid documents, not trans-"actions." Nor do they apply to documents accompanying a pledge of goods where possession of the goods is actually given (*q*); nor to an assignment for value of *future* chattels, without the right to take possession (*r*).

(*i*) *Reeves* v. *Barlow* (1883). 12 Q. B. D. 436.

(*k*) *Coburn* v. *Collins* (1887), 35 Ch. D. 373.

(*l*) Act of 1878, s. 6.

(*m*) *Re Roundwood Colliery Co.*, *supra*; *Mumford* v. *Collier* (1890), 25 Q. B. D. 279; *Green* v. *Marsh*, [1892] 2 Q. B. 330.

(*n*) Act of 1878, s. 4.

(*o*) *Wenman* v. *Lyon*, [1891] 2 Q. B. 192.

(*p*) *Re Standard Co.*, [1891] 1 Ch. 627; *Richards* v. *Kidderminster*, [1896] 2 Ch. 212.

(*q*) *Ex parte Hubbard* (1883), 17 Q. B. D. 690.

(*r*) *Morris* v. *Delobbel-Flipo*, [1892] 2 Ch. 352.

"Personal *chattels*" *within the Acts.*—The expression "personal chattels" is defined by sect. 4 of the Act of 1878. It includes "goods, furniture, and other articles capable of "complete transfer by delivery and (when separately "assigned or charged) fixtures and growing crops." It does not include chattels real, fixtures assigned with land (*s*) (except trade machinery) (*t*), growing crops assigned with the land on which they grow, or stocks, shares, or *choses in action.*

Statutory requirements as to absolute bills.—These, as already mentioned, are governed solely by the Act of 1878. An absolute bill of sale requires to be duly attested by a solicitor, and such attestation must state that, before the execution of the bill, its effect was explained to the grantor by solicitor (*u*).

The consideration must be truly stated (*x*). And the bill must be registered within seven days in accordance with the Act (*y*). Upon application for such registration, a true copy of the bill and of every schedule or inventory annexed to it and of every attestation of its execution must be filed, together with an affidavit proving the date of execution of the bill and its due execution and attestation, and containing particulars of the residence and occupation of the grantor and of every attesting witness (*z*). The effect of non-compliance with these requirements, in the case of an *absolute* bill, is not to make the bill void altogether, but may be stated shortly as follows. As regards chattels comprised in it which remain in the *apparent possession* of the grantor, the bill is void *as against the trustee in bankruptcy and execution creditors of the grantor*, unless it is duly executed, attested, and registered within seven days after the making of it (*a*). Goods

(*s*) *Re Brooke*, [1894] 2 Ch. 647; *Small* v. *National Provincial Bank*, [1894] 1 Ch. 680.

(*t*) See Act of 1878, s. 5.

(*u*) *Ibid.*, ss. 8, 10.

(*x*) Act of 1878, s. 8.

(*y*) *Ibid.*, s. 10.

(*z*) *Feast* v. *Robinson* (1894), 63 L. J. Ch. 321; *Sharp* v. *McHenry* (1887), 38 Ch. D. 437.

(*a*) Act of 1878, s. 8.

are deemed to be in the "*apparent possession*" of the grantor "so long as they remain or are in or upon any "house, mill, warehouse, building, works, yard, land, or "other premises occupied by him, or are used and enjoyed "by him in any place whatsoever, notwithstanding that "formal possession thereof may have been taken by or "given to any other person" (*b*). It is to be observed that the Act does not render an unregistered *absolute* bill void as between grantor and grantee (*c*). So long as an absolute bill continues to be duly registered, the chattels comprised in it are not deemed to be in the "possession, order, or disposition" of the grantor, within the meaning of the Bankruptcy Act, 1883 (*d*).

Bills by way of security.—The statutory provisions with regard to these are very strict and highly technical. It is of the utmost importance that they should be exactly complied with, as non-compliance makes the bill altogether void as a disposition of the chattels comprised in it, even as between the grantor and the grantee. In the case, however, of a bill which is not duly registered, or the consideration for which is not truly stated, the grantor may remain liable on the covenant for payment, though the grantee gets no title to the chattels (*e*). But if such a bill is void by reason of its not being made in the statutory form, it is void *in toto*, even as regards the covenant for payment (*f*).

The chief statutory requirements in the case of a bill of sale by way of security, are as follows: (1) It must be "made in accordance with the form in the schedule" to

(*b*) Act of 1878, s. 4; *Robinson* v. *Briggs* (1870), L. R. 6 Ex. 1; *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18; *In re Satterthwaite* (1895), 2 Manson 52; *Antoniadi* v. *Smith*, [1901] 2 K. B. 589.

(*c*) *Davis* v. *Goodman* (1880), 5 C. P. D. 128; and cf. *In re D'Epineuil* (1882), 20 Ch. D. 217.

(*d*) Act of 1878, s. 20; *Swift* v. *Pannell* (1883), 24 Ch. D. 210.

(*e*) Act of 1882, s. 8; *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547.

(*f*) *Ibid.*, s. 9; *Davies* v. *Rees* (1886), 17 Q. B. D. 408; *Saunders* v. *White*, [1901] 1 Q. B. 70.

the Act of 1882 (*g*). It is void if it "departs from the statutory form in anything which is a characteristic of that form" (*h*); (2) It must have annexed to it a schedule containing an inventory of the chattels comprised in it (*i*). As regards all other chattels, except those specifically described in such inventory, it is void "except as against the grantor"; (3) It must be duly attested by one or more credible witnesses. Every witness must sign his name and add his address and description (*k*); (4) It must be duly registered within seven days of execution, together with a copy of the bill. And an affidavit of due execution and attestation must be made as in the case of an absolute bill (*l*); (5) It must truly state the consideration (sect. 8); (6) The grantor must be the "true owner" of the chattels described in the inventory. As regards any chattels of which he is not the true owner, the bill is void "except as against the grantor" (*m*); (7) The consideration for the bill must not be less than 30*l*. (*n*); (8) Any defeasance, condition, or declaration of trust to which the bill is made subject, must be contained in the bill itself (*o*), and terms or covenants contained in the bill must be carefully limited to such as are "for the main-"tenance or defeasance of the security"; otherwise the bill will be void under sect. 9 of the Act of 1882 (*p*).

The *right of the grantee to seize, remove, or sell* the chattels under the bill of sale, is restricted by sect. 7 of the

(*g*) Section 9.

(*h*) *Thomas* v. *Kelly*, [1888] 13 A. C. 506; *Ex parte Stanford* (1886), 17 Q. B. D. 259; *Reed* v. *Bradley*, [1894] 1 Q. B. 319.

(*i*) Act of 1882, s. 4; *Witt* v. *Banner* (1887), 20 Q. B. D. 114; *Thomas* v. *Kelly*, *supra*.

(*k*) Act of 1882, s. 10; *Parsons* v. *Brand* (1890), 25 Q. B. D. 110.

(*l*) Act of 1882, s. 10; Act of 1878, s. 10; *Heseltine* v. *Simmons*, *supra*; *Darlow* v. *Bland*, [1897] 1 Q. B. 125.

(*m*) Section 5; *Thomas* v. *Searles*, [1891] 2 Q. B. 408.

(*n*) Act of 1882, s. 12; *Davies* v. *Usher* (1883), 12 Q. B. D. 490.

(*o*) Act of 1878, s. 10.

(*p*) See schedule to the Act of 1882; and see *Peace* v. *Brooks*, [1895] 2 Q. B. 451; *Ex parte Stanford*, *supra*.

Act of 1882, to the following cases, *i.e.*: (1) If the grantor makes default in payment of the debt secured or interest, or in performance of any agreement contained in the bill necessary for maintaining the security; (2) If the grantor becomes bankrupt or suffers the goods to be distrained upon for rent, rates, or taxes; (3) If the grantor fraudulently removes the goods from the premises; (4) If the grantor does not, without reasonable excuse, produce to the grantee on demand in writing, his last receipts for rent, rates and taxes; and (5) If execution is levied against the goods of the grantor under any judgment. By sect. 13 of the Act of 1882, it is further provided that after seizure the goods shall not be sold or removed for five days, during which period the grantor may, if the cause for seizure no longer exists, apply to the court, under sect. 7, to restrain a sale or removal (*q*).

Other points under the Acts.—The registration of a bill of sale must, by sect. 11 of the Act of 1878, be renewed every five years. The Court can, in a proper case, rectify the register and extend the time for registration or renewal (sect. 14 of the Act of 1878). When a bill is satisfied, the registrar may order a memorandum of satisfaction to be entered on the filed copy. Finally, it may be observed that the due registration of bills of sale *by way of security*, does not prevent chattels comprised in them from falling within the "order and disposition" clause of the Bankruptcy Act, 1883 (sect. 43), in case of the grantor's bankruptcy (*r*).

(*q*) Generally as to the grantor's rights, see *Johnson* v. *Diprose*, [1893] 1 Q. B. 512.

(*r*) Act of 1882, s. 15; *Re Ginger*, [1897] 2 Q. B. 461.

CHAPTER VI.

OF TITLE BY BANKRUPTCY.

THE property of a bankrupt is, by the statute law, divested out of him and vested in the bankruptcy trustee, for distribution by the latter among the general creditors of the bankrupt. The title of the trustee and (through him) of the creditors of the bankrupt, is consequently *by bankruptcy*; and it extends not merely to the personal estate, but also to the real estate, of the debtor.

The foundation of the law of bankruptcy in this country is the statute 34 & 35 Hen. VIII. (1542) c. 4, which described *bankrupts* as those "who obtain other men's goods and then suddenly flee to parts unknown, or keep their houses and there consume their substance, without paying their debts." And the Act (as subsequently amended by the 13 Eliz. (1571) c. 7) provided that, upon complaint in writing to the Lord Chancellor, not only the property but also the person of the debtor, should be made available for the payment of all his creditors rateably, according to their debts. In both these Acts (as will have been observed) the bankrupt was, in a sense, regarded as a criminal, and he met with no favour at the hands of the legislature. At length, however, it came to be considered harsh to strip a man of all his resources, and at the same time not to relieve him from his difficulties; and it was accordingly provided, by the 4 & 5 Anne (1705), c. 4, in imitation probably of the Roman law of *cession* (*a*), that a bankrupt trader, who had been compelled to surrender the whole of his effects, and had in all matters conformed to the law of

(*a*) 2 Bl. Com., p. 473, citing Cod. 7, 71; Inst. 4, 6, 40.

bankruptcy, should be entitled to his discharge from all further liability for his debts theretofore contracted.

By divers subsequent statutes, further provisions were enacted,—applicable some of them to traders, and others of them to non-traders,—for bringing debtors within the law relating to bankrupts; and further, any debtor (whether a trader or not), was enabled, under these later statutes, to institute voluntary proceedings against himself, with the view of becoming a bankrupt, and so of obtaining a discharge from his debts and liabilities. The administration of the law of bankruptcy (which had originally been entrusted to commissioners appointed by the Lord Chancellor, and acting for each case separately) came at length to be assigned, for all bankruptcies arising within the metropolitan area, to a particular court called the "Court of Bankruptcy"; and, for all bankruptcies arising outside of that area, to district bankruptcy courts, which latter courts are now represented by such of the county courts as have jurisdiction in bankruptcy.

The statutes of Henry, Elizabeth, and Anne above referred to, and some subsequent Acts on the same subject, were repealed by the 6 Geo. IV. (1825) c. 16, whereby a new system was then established for bankruptcy administrations. But this new system, after continuing in force for a considerable time, was itself afterwards abandoned; and in the course of the reign of Victoria, successive attempts were made to provide a satisfactory system for the administration of bankrupt estates (*b*). The existing system is that which has been provided by the Bankruptcy Act, 1883 (*c*), the Bankruptcy (Discharge and Closure) Act, 1887 (*d*), and the Bankruptcy Act, 1890 (*e*), and the

(*b*) 12 & 13 Vict. c. 106 (The Bankruptcy Act, 1849); 24 & 25 Vict. c. 134 (The Bankruptcy Act, 1861); and 32 & 33 Vict. c. 71 (The Bankruptcy Act, 1869).

(*c*) 46 & 47 Vict. c. 52; General Rules, 1886 and 1890; Scale of Fees and Percentages, October, 1886; and Order as to Stamps, October, 1886.

(*d*) 50 & 51 Vict. c. 66.

(*e*) 53 & 54 Vict. c. 71.

rules made thereunder; which system is, in all its branches, subject to the control of the Board of Trade, an entirely new feature in our bankruptcy law. The tribunals having jurisdiction in bankruptcy are now the High Court of Justice, to which the jurisdiction of the London Court of Bankruptcy was transferred by the Act of 1883, and such of the county courts as are not excluded from bankruptcy jurisdiction by order of the Lord Chancellor (*f*).

In proceeding to consider the existing law of bankruptcy, we shall first of all inquire, *who is capable of being made (or of becoming) bankrupt*; secondly, *under what circumstances and in what manner he is adjudicated bankrupt*; thirdly, *the proceedings in the bankruptcy generally, subsequently to adjudication, or subsequently to the receiving order* (which in general precedes the adjudication); fourthly, *the effect of the bankruptcy on his estate*; and fifthly, *the bankrupt's discharge*; and we shall conclude by giving some account of the *compositions or schemes of arrangement* which debtors not infrequently enter into, and which, although they formed no part originally of the law of bankruptcy, are now become closely connected with it. And here let us premise this one observation, namely, that upon every court having jurisdiction in bankruptcy as now established, there has been conferred a general power of deciding all questions of priorities, and all questions whatsoever, whether of law or of fact, which may arise in any case of bankruptcy, and which it may be deemed by that court necessary or expedient to decide for the purpose of doing complete justice, or of making a complete distribution of the property of the bankrupt; and in the execution of its powers, a court having jurisdiction in bankruptcy under the Act, is not liable to be restrained by the order of any other court (*g*).

(*f*) Act of 1883, ss. 92, 93.

(*g*) *Ibid.*, s. 102, re-enacting a similar provision in the Act of 1869, s. 72; *Ex parte Dickin*, *In re Pollard* (1878), 8 Ch. D. 377; and *In re Lowenthal* (1884), 13 Q. B. D. 238.

I. *Who is capable of being made a bankrupt.*—This is a predicament which has always been, and still is, applicable to none but *debtors*; and the term "debtor" has the same sense in bankruptcy as under the general law, and imports a party bound (at law or in equity) to pay another a certain and liquidated sum of money. But we must bear in mind, of course, that although a judgment debtor is a "debtor," not every judgment or order of the court for the payment of money makes a man a "debtor" (*h*).

Under the older bankruptcy laws, traders alone could be brought within the jurisdiction; and this distinction gave rise to many disputes as to what constituted a person a trader for the purposes of the statutes. But, with the single exception to be hereafter noticed, the distinction between traders and non-traders has ceased to apply, all persons, generally speaking, being now liable to be made bankrupt. This exception is the case of the married woman, who, though not, as a rule, within the scope of the bankrupt laws, may, by the Married Women's Property Act, 1882, if she carries on trade separately from her husband, be made bankrupt in respect of her separate estate (*i*); but the bankruptcy could not be based upon non-compliance with a bankruptcy notice (*k*). An infant cannot, in the ordinary way, even though engaged in trade, be made bankrupt, inasmuch as he cannot bind himself by ordinary contract (*l*). Whether he could be made bankrupt in respect of debts for necessaries, or for liabilities in torts, seems never to have been decided. Persons who (as being either peers or members of Parliament) used to have certain privileges or protection from

(*h*) *In re Sacker, Ex parte Sacker* (1888), 22 Q. B. D. 179, explaining *Ex parte Harris* (1876), 2 Ch. D. 423; 53 & 54 Vict. c. 71, s. 1.

(*i*) 45 & 46 Vict. c. 75; Act of 1883, s. 152; and see *In re Gardiner* (1887), 20 Q. B. D. 249; *In re Lynes*, [1893] 2 Q. B. 113.

(*k*) *In re Frances Handford & Co.*, [1899] 1 Q. B. 566.

(*l*) *Ex parte Jones, In re Jones* (1881), 18 Ch. D. 109, overruling *Ex parte Lynch* (1876), 2 Ch. D. 227.

civil process, are no longer protected from the liability to be made bankrupts (*m*); and aliens, denizens, and persons naturalized, are as amenable to the law of bankruptcy as natural-born subjects (*n*). But the debtor must be domiciled in England (*o*); or must, at all events, have had (within a year before the date of the presentation of the petition) his residence or place of business in England (*p*), in order to be made a bankrupt.

II. *Under what circumstances, and in what manner, a debtor may be made a bankrupt.*—Bankruptcy proceedings may be taken either by a creditor or creditors, or by the debtor himself, the first step in each case being the filing of a petition praying for a receiving order (*q*). But in the case of a creditor's petition, it is essential that the debtor shall have committed, within three months prior to the presentation of the petition, one or more of the following nine *acts of bankruptcy*, viz.: (1) That he has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally (*r*); (2) That he has, in England or elsewhere, made a *fraudulent* conveyance, gift, delivery, or transfer of his property, or of any part thereof; (3) That, in England or elsewhere, he has made any conveyance or transfer of his property, or any part thereof, or created any charge thereon, which would, under the Bankruptcy Act, 1883, or any other Act, be void as a fraudulent preference if he were adjudged bankrupt; (4) That he has, with intent to defeat or delay his

(*m*) *Duke of Newcastle* v. *Morris* (1870), L. R. 4 H. L. 661; 34 & 35 Vict. (1871) c. 50, ss. 6—8; Act of 1883, ss. 32, 33; *In re Russell* (1872), L. R. 7 Ch. App. 519.

(*n*) *Allen* v. *Cannon* (1821), 4 B. & Ald. 418.

(*o*) *Ex parte Cunningham* (1884), 13 Q. B. D. 418.

(*p*) *Cooke* v. *Vogeler & Co.*, [1901] A. C. 102; *In re Bright* (1902), 18 T. L. R. 37.

(*q*) Forms in Appendix to General Rules, 1886; No. 4, Debtor's Petition; No. 10, Creditor's Petition.

(*r*) *In re Phillips, Ex parte Barton*, [1900] 2 Q. B. 329.

creditors, done any of the following things, viz., departed out of England; or, being out of England, remained out of England; or departed from his dwelling-house, or otherwise absented himself; or begun to keep house (*s*); (5) That execution issued against him has been levied by seizure and sale of his goods, under process in an action in any court or in any civil proceeding in the High Court; (6) That execution issued against him has been levied by seizure of his goods under such process as last-mentioned, and the goods (without having been actually sold by the sheriff) have been held by him for twenty-one days (*t*); (7) That the debtor has filed in the court a declaration admitting his inability to pay his debts, or has presented a bankruptcy petition against himself (*u*); (8) That a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England (or, by leave of the court, elsewhere) a "bankruptcy notice" under the Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or of the court, and he has not,—within seven days after service of the notice in case the service is effected in England, and, in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service,—either complied with the requirements of the notice or satisfied the court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained; and (9) That the debtor has given notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts. And here it is to be noted

(*s*) *Ex parte Meyer, In re Stephany* (1871), L. R. 7 Ch. App. 188; *Ex parte Coates, In re Skelton* (1877), 5 Ch. D. 979.

(*t*) Act of 1890, s. 1.

(*u*) *Ex parte Duignan, In re Bissell* (1872), L. R. 6 Ch. App 605.

(as being in some sense a tenth act of bankruptcy), that, on an application under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, made by a judgment creditor for an order of committal against the judgment debtor, the court may (in lieu of committing) make a receiving order against the debtor, providing the creditor consent thereto; and in such a case, the debtor is deemed to have committed an *act of bankruptcy* at the time such order is made (*v*).

As regards the first and second of the nine acts of bankruptcy, it should be observed, that the character of the transaction, as being innocent or fraudulent, is to be determined exclusively by its effects upon the creditors of the debtor. So that any transfer is fraudulent, which is void under the statute 13 Eliz. (1571) c. 5; or which substantially conveys the debtor's whole property in consideration of a pre-existing debt (*x*); or which conveys even a portion of his property in consideration of such a debt, if made *voluntarily* and *in contemplation of bankruptcy*, or if it otherwise has the effect of defeating or delaying the creditors (*y*).

Such being the different acts of bankruptcy, one of which must have been committed before a petition can be filed by a creditor, we may next notice that there must be a debt owing to the creditor amounting to 50*l.* or upwards; but any two or more creditors whose debts in the aggregate amount to 50*l.* may be the petitioning creditors. The debt must be a liquidated sum due either at law or in equity (*z*), and payable either immediately or at some certain future time; it must, of course, be an actionable debt (*a*); and if the debt of the petitioner should be a secured debt, then the creditor must, in his petition, state

(*v*) Act of 1883, ss. 4, 6.

(*x*) *Worsley* v. *De Mattos* (1758), 1 Burr. 467; *Ex parte Ellis* (1876), 2 Ch. D. 797; *Ex parte Chaplin* (1884), 26 Ch. D. 319.

(*y*) *Alton* v. *Harrison* (1869), L. R. 4 Ch. App. 622.

(*z*) *Ex parte Blencowe* (1866), L. R. 1 Ch. App. 393.

(*a*) *Ex parte Sturt, In re Pearcy* (1871), L. R. 13 Eq. 309.

that he is willing to give up his security for the benefit of the creditors in the event of an adjudication of banktuptcy, or else he must give an estimate of the value of the security, and then he is deemed to be a petitioning creditor in respect only of the balance of his debt. The petition, which must be on oath (*b*), is to be filed either in the county court (which has, for this purpose, all the jurisdiction of the High Court) or in the High Court (*c*), according to the following distinctions, that is to say :—If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or if he is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition must be presented to the High Court. In any other case, the petition must be presented to the county court for the district in which the debtor has resided or carried on business, for the longest period during the six months immediately preceding the presentation of the petition.

The petition (unless indeed it is filed by the debtor himself) must be duly served on the debtor ; and, in order to prevent his avoiding such service, the debtor may (in a proper case) be arrested under the Bankruptcy Act, 1883 (*d*), as amended by sect. 7 of the Bankruptcy Act, 1890 (*e*).

Upon the hearing of the petition, unless it is dismissed, a receiving order will be made. But at any time after the presentation of the petition, the court may make an *interim* receiving order ; and after such order, no creditor may commence any action or other proceeding against the debtor or his property, and the court may even stay any

(*b*) Act of 1883, s. 7.
(*c*) Sect. 95; Reg. Gen. 145 (October, 1886).
(*d*) 46 & 47 Vict. c. 52, s. 25.
(*e*) 53 & 54 Vict. c. 71.

pending action or execution or other legal process (*f*). Notice of the receiving order is sent to the official receiver and to the Board of Trade, and is advertised; and the effect of it is, to constitute the official receiver *interim* receiver of the property of the debtor. Such official receiver may (sect. 12) appoint a special manager until a trustee is appointed.

Within seven days from the date of the receiving order made on the petition (if the same is a creditor's petition), and within three days from that date (if the petition is that of the debtor himself), the debtor makes out and submits to the official receiver a statement of his affairs, showing the particulars of his assets and liabilities (*g*); and as soon as conveniently may be after such receiving order has been made and advertised as already mentioned, the official receiver is to summon a general meeting (usually called the *first* meeting) of the creditors, of which seven days' notice is given in the London Gazette (*h*), and in a local paper. This notice is, in the general case, for a day not later than fourteen days from the date of such receiving order (*i*); and the official receiver sends to each of the creditors mentioned in the debtor's statement of affairs a summary of that statement (*k*).

At this meeting the creditors consider whether the debtor shall be made a bankrupt or not, or whether, supposing any composition be offered by the debtor, it shall be accepted or not, a subject which will be dealt with later (*l*). If they at such first meeting, or at any adjournment thereof, by ordinary resolution, resolve that the debtor be adjudged bankrupt,—or if they pass no resolution, or do not even meet,—the court adjudges the debtor a bankrupt; and thereupon the property of the bankrupt becomes divisible among his creditors, and for

(*f*) Act of 1883, ss. 5, 9, 10; *Ex parte Anderson* (1870), L. R. 5 Ch. App. 473.
(*g*) Sect. 16.
(*h*) Sect. 15; First Schedule.
(*i*) First Schedule, rule 1.
(*k*) *Ibid.*, rule 3.
(*l*) Pp. 220 *et seq.*

that purpose vests in a trustee (*m*). The adjudication order is then forthwith published in the London Gazette, and in such local papers as may be prescribed; and the production of a copy of the Gazette, containing a copy of the order, is made conclusive evidence of the debtor having been adjudged a bankrupt, and of the date of the adjudication (*n*). We may further observe here, that a debtor may also be adjudicated a bankrupt, either (1) for failing without reasonable excuse to submit to the official receiver his statement of affairs hereinafter mentioned (sect. 16); or (2) for default in the payment of any instalment due in pursuance of any composition or scheme of arrangement arrived at as hereinafter mentioned (sect. 18); or (3) on the application of a judgment creditor (under the Debtors Act, 1869, s. 5) for a committal order against the debtor (s. 103).

III. *The proceedings subsequent to the adjudication or receiving order.*—Having now shown upon what grounds and in what manner a debtor is adjudicated bankrupt, we have next to advert more particularly to the proceedings which take place after such adjudication, or after the receiving order has been made, other than the matters relative to the realisation and distribution of the bankrupt's property by the trustee (which will be considered incidentally in treating of the effect of the bankruptcy on the debtor's property), and other than the bankrupt's discharge (which will be the last subject for consideration in an ordinary bankruptcy).

At the first meeting, the creditors, if they then resolve that the debtor shall be made a bankrupt, proceed to appoint some creditor or other fit person to fill the office of *trustee* of the bankrupt's property (*o*); and to appoint from among the creditors fit persons, not more than five nor less than three in number, who shall form a *committee*

(*m*) Sect. 20.
(*n*) *Ibid.*
(*o*) Sect. 21.

of inspection, for the purpose of superintending the administration of the bankrupt's property by the trustee (*p*). In case the creditors neglect at such meeting to appoint a trustee, the Board of Trade appoints one until such time as the creditors shall have made the appointment; but the creditors may leave it to the committee of inspection to make the appointment (*q*). The first meeting is, as a general rule, presided over by the official receiver (or his nominee) (*r*), in whom the property of the bankrupt vests, from the date of the receiving order, until some other trustee is appointed (*s*); and at the first or any other meeting, or at any time after the adjudication, any creditor may *prove his debt*, by an affidavit which is sent (prior to the appointment of the trustee) to the official receiver of the court, and (after such appointment) to the trustee himself. And no person is entitled to vote as a creditor, either at the first or at any subseqnent meeting, unless he has first duly proved his debt in the prescribed manner (*t*).

The trustee has to give security to the satisfaction of the Board of Trade, and his appointment only becomes effective upon, and as from the date of the certificate of the Board of Trade (*u*); and such certificate is conclusive evidence of his appointment (*x*). The property of the bankrupt thereupon passes out of the official receiver and vests in the trustee, but the trustee remains subject to the control of the Board, which is rendered effective by the following (among other) provisions of the Bankruptcy Act, 1883. The trustee is required, not less than twice in each year during his tenure of office, to send to the Board of Trade an account of his receipts and payments as trustee; and the Board of Trade is to cause the accounts so sent to be audited; and for the

(*p*) Sect. 22.
(*q*) Sect. 21, sub-s. (6); *In re Finney* (1870), L. R. 6 Ch. App. 79.
(*r*) First Schedule, rule 7.
(*s*) Sect. 54.
(*t*) Second Schedule, rule 2.
(*u*) Sect. 21.
(*x*) Sect. 138.

purposes of the audit, the trustee is to furnish the Board with such vouchers and information as the Board may require ; and the Board may at any time require the production of, and inspect, any books or accounts kept by the trustee ; and when such account has been audited, one copy thereof is to be filed and kept by the Board, and the other copy is to be filed with the court, and each copy is to be then open to the inspection of any creditor, or of the bankrupt, or of any person interested (sect. 78). Further, the trustee is required, as often as may be prescribed, and in any case not less than once in every year during the continuance of the bankruptcy, to transmit to the Board of Trade a statement showing the proceedings in the bankruptcy up to the date of the statement, containing the prescribed particulars, and made out in the prescribed form ; and the Board of Trade is to cause the statements so transmitted to be examined ; and is to call the trustee to account for any misfeasance, neglect, or omission which may appear on the statement, or in his accounts, or otherwise ; and may require the trustee to make good any loss which the estate of the bankrupt has sustained by his misfeasance, neglect, or omission (sect. 81). If at any time the trustee keeps in his hands for more than ten days any sum exceeding 50*l.*, he must pay interest on the same at the rate of 20*l.* per cent. ; he is liable, moreover (unless he can satisfy the Board of Trade as to the retention), to be dismissed from his office without remuneration.

The duty of the creditors' trustee chosen and approved as above is, generally, to exercise his best discretion in the management of the estate until the bankruptcy is closed, and until he (the trustee) has obtained his release (*y*). Until that event, the trustee may from time to time summon general meetings of the creditors, for the purpose of ascertaining their wishes ; he may also from time to time apply to the court for directions, in relation to any

(*y*) Sect. 82.

particular matter arising in the bankruptcy; and, as the bankruptcy proceeds, he consults with the committee of inspection as to his proceedings. And with a view to the full and due realization by the trustee of the assets of the bankrupt, authority is specifically given to him, by the Bankruptcy Act, 1883, to exercise divers powers either of his own authority or with the sanction of the committee of inspection. Thus, he is to have power *of his own authority* to sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels; to give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof; to prove, rank, claim, and draw a dividend in respect of, any debt due to the bankrupt; to exercise any powers the capacity to exercise which is vested in the trustee under the Act, and to execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of the Act; to deal with any property to which the bankrupt is beneficially entitled as tenant-in-tail in the same manner as the bankrupt might have dealt with it, including the power to execute disentailing assurances under the Fines and Recoveries Act, 1833. Moreover, *with the sanction of the committee of inspection*, the trustee may carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same; may bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt; may employ a solicitor or other agent to take any proceedings or to do any business which may be sanctioned by the committee of inspection; may accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and

otherwise as the committee think fit; may mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts; may refer any dispute to arbitration; may compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist, between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms, as may be agreed on; may make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts proveable under the bankruptcy; may make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person, or by the trustee on any person; and may divide in its existing form among the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot be readily or advantangeously sold (s. 57). The trustee may also (*with the sanction of the committee*) employ the bankrupt himself to superintend the management of his property; and may make an allowance to him for his support, or in consideration of his services (sect. 64).

As soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs, the court holds a public sitting for the examination of the debtor (called his *public examination*); and of the date of such public sitting the official receiver gives notice by advertisement in the London Gazette and in a local paper. This public examination of the debtor proceeds upon the *statement of his affairs*; and the official receiver, the trustee, and the court, may put questions to the debtor, as likewise may any creditor who has tendered a proof of his debt; and it is the duty of the debtor to

answer all such questions. The debtor is of course bound, on the day appointed for his public examination, and on any adjournment of such examination, to attend the court; and, a note of his examination having been taken down in writing, such note is read over to and signed by the debtor, and is afterwards open to the inspection of any of his creditors, and may be used in evidence against him. When the court is satisfied that the affairs of the debtor have been sufficiently investigated, it makes an order declaring that the public examination is concluded. But such order will not be made until after the day appointed for the first meeting of the creditors (*a*).

The bankrupt, besides submitting his statement of affairs, and besides attending on his public examination and on any adjournment thereof, is required also to attend the meetings of his creditors; to wait on the official receiver or trustee; to execute necessary powers and instruments; to furnish an inventory of his property; and, generally, to do everything in relation to his property and the distribution of its proceeds amongst his creditors which may reasonably be required by the trustee, or which may be ordered by the court (*b*).

Moreover, the bankrupt will be guilty of a misdemeanor, —and under the provisions for the punishment of fraudulent debtors contained in the Debtors Act, 1869 (*c*), as modified by the Bankruptcy Act, 1883 (*d*), and by the Bankruptcy Act, 1890 (*e*), will be liable, on conviction at the assizes or quarter sessions, to be imprisoned for any time not exceeding *two years*, with or without hard labour, if he shall be guilty of any of the following acts,—that is to say: 1. If he does not, to the best of his knowledge and belief, discover to his trustee all his property, and the mode in which he has disposed of

(*a*) Act of 1883, s. 17; *In re Angerstein* (1872), L. R. 7 Ch. App. 662.

(*b*) Sect. 24.

(*c*) 32 & 33 Vict. c. 62.

(*d*) Sects. 163—167.

(*e*) Sect. 26.

any part thereof, except in the ordinary way of his trade (if any), or in the ordinary expenses of his family; 2. If he does not deliver up all such part of his property as is in his custody or control, and which he is required by law to deliver up; 3. If he does not deliver up all books, documents, papers, and writings in his custody or control, which relate to his property or affairs; 4. If, after the presentation of a petition, or within four months before, he conceals any part of his property to the value of 10*l.* or upwards, or conceals any debt due to or from him; 5. If, within the same period, he removes any part of his property to the value of 10*l.* or upwards; 6. If he makes any material omission in any statement relating to his affairs; 7. If, knowing or believing that a false debt has been proved against his estate, he fails for the period of a month to inform his trustee thereof; 8. If, after the presentation of a petition, he prevents the production of any book or document, affecting or relating to his property or affairs; 9. If, after the presentation of a petition, or within four months before, he (either as party or privy) conceals, destroys, mutilates, or falsifies any book or document affecting or relating to his property or affairs; 10. If, within the same period, he makes, or is privy to the making of any false entry in any such book or document; 11. If, within the same period, he parts with, alters, or makes any omission in any such document; 12. If, after presentation of a petition, or at any meeting of his creditors held within four months before, he attempts to account for any part of his property by fictitious losses or expenses; 13. If, within four months next before a petition, he, by false representation or other fraud, has obtained property on credit, and has not paid for the same; 14. If, within the same period, he has obtained under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same; 15. If, within the same period, he has pawned, pledged, or disposed of, otherwise than in the

ordinary way of his trade, any property which he has obtained on credit, and has not paid for; 16. If he is guilty of any false representation or other fraud, for the purpose of obtaining the consent of his creditors, or any of them, to any agreement with reference to his affairs, or to his bankruptcy or liquidation (*f*).

Moreover, any such bankrupt or person against whom a receiving order has been made (or indeed any person), is deemed guilty of a misdemeanor, and is liable on conviction to imprisonment for *one* year, with or without hard labour, who (*with intent to defraud his creditors*) does any of the following things, viz.:—1. If, in incurring any debt or liability, he obtains credit under false pretences, or by means of any other fraud; 2. If he makes or causes to be made, any gift, delivery, or transfer of, or any charge on, his property; 3. If he conceals or removes any part of his property, within two months before the date of any unsatisfied judgment, or order for payment of money, obtained against him (*g*). And in the following case, a bankrupt, or person against whom a receiving order has been made, will be guilty of *felony*, and be liable to two years' imprisonment with or without hard labour, that is to say, if, after the presentation of the petition (or four months before), he has, with intent to defraud his creditors, quitted (or attempted, or made preparation, to quit) England, and has taken (or attempted to take) with him any part of his property, to the amount of 20*l.* or upwards, which ought by law to be divided among his creditors (*h*).

Lastly, the court may, on the application of the official receiver or of the trustee, after the receiving order has been made, summon before it the bankrupt, or his wife, or any other person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to him, or thought capable of

(*f*) Debtors Act, 1869, s. 11; Act of 1890, s. 26.
(*g*) Debtors Act, 1869, s. 13.
(*h*) *Ibid.*, s. 12.

giving information as to him, his dealings or property; and, in case of such person not appearing (having no lawful impediment allowed by the court), the court may direct him to be arrested and brought before it; and, on his appearing, voluntarily or otherwise, may *examine* him, either by word of mouth or by written interrogatories, concerning the bankrupt, his dealings or property (*i*).

IV. *The effect of the bankruptcy on the property of the bankrupt.*—Upon a receiving order being made, the property of the bankrupt (as we have seen) vests immediately in the official receiver until a trustee is appointed (*k*). By force of his appointment, and subject to the exceptions which will presently be mentioned, the trustee takes, for the benefit of the creditors, all the lands, tenements, and hereditaments of the bankrupt, together with all his personal estate and effects, present and in expectancy, and wherever situate,—in other words, all such "property" as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or which (with the exceptions about to be noticed) may be acquired by or devolve on him before his discharge (*l*); and also all powers which he is entitled to exercise for his own benefit, except the right of nomination to any vacant ecclesiastical benefice (*m*). Moreover, in certain cases, the property even of *strangers*, if found in the bankrupt's possession, vests in the trustee. For it is one of the enactments of the bankrupt law (introduced to protect creditors from fraud and fallacious appearances), that where a bankrupt shall, at the commencement of the bankruptcy, have in his possession, order, or disposition in his trade or business, *by consent and permission of the true owner*, any goods under such circumstances that he (the bankrupt) is the

(*i*) Act of 1883, s. 27; *Ex parte Reynolds* (1882), 20 Ch. D. 294.

(*k*) Act of 1883, ss. 9, 12; *In re Parker* (1885), 15 Q. B. D. 196.

(*l*) Act of 1883, s. 44. (See *Ex parte Deerhurst* (1871), L. R. 7 Ch. App. 185.)

(*m*) *Badham* v. *Mee* (1831), 7 Bing. 695.

reputed owner thereof, they shall be deemed to form part of the property of the bankrupt divisible amongst his creditors,—things in action (other than trade or business debts) being, however, expressly excluded from this order and disposition clause (*n*). And it is to be observed, that goods and chattels comprised in a mortgage deed (as, *e.g.*, a duly registered bill of sale) may be, and usually are, held to remain in the order and disposition of the debtor; the clause in the Bills of Sale Act, 1878 (*o*), which prohibited this construction, having been repealed by the Bills of Sale Act, 1882 (*p*), although it is difficult to see the justice of such a provision, more especially as the provision does not now apply to a registered bill of sale given otherwise than by way of mortgage.

On the other hand, there passes not to the trustee any property which the bankrupt may earn purely by his personal labour or services, after the bankruptcy has commenced (*q*); nor his right of action for a personal wrong, *e.g.*, slander (*r*); nor any property held by the bankrupt in the capacity of trustee for others (*s*); nor any appointment to an office which cannot legally be sold (*t*); nor the right to receive military or other pay under the Crown (*u*). Nevertheless, the court may (with the sanction of the chief officer of the department to which the bankrupt belongs or belonged) order portions of such pay

(*n*) Act of 1883, s. 44 (iii); *Ex parte Union Bank of Manchester* (1871), L. R. 12 Eq, 354; *In re Sillence* (1877), 7 Ch. D. 70; *In re Blanchard* (1878), 8 Ch. D. 601; *Ex parte Nottingham Bank* (1885), 15 Q. B. D. 441; *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 261; 11 App. Ca. 426.

(*o*) *Supra*, p. 186.

(*p*) 45 & 46 Vict. c. 43, s. 15; *Seyfi* v. *Pannell* (1883), 24 Ch. D. 210.

(*q*) *Elliott* v. *Clayton* (1851), 16 Q. B. 581; *Emden* v. *Carte* (1881), 17 Ch. D. 768; *Ex parte Bennett* (1884), 14 Q. B. D. 301; *In re Rogers, Ex parte Collins*, [1894] 1 Q. B. 425.

(*r*) *Rogers* v. *Spence* (1844), 13 M. & W. 571; *Ex parte Vine, In re Wilson* (1878), 8 Ch. D. 364.

(*s*) Act of 1883, s. 44.

(*t*) *M'Bean* v. *Deane* (1885), 30 Ch. D. 520.

(*u*) *Gibson* v. *East India Company* (1839), 5 Bing. N. C. 262.

to be applied in payment of his debts (*x*); and, subject to due provision for the carrying on of parochial duty, the benefice of a bankrupt clergyman may be sequestrated by his trustee for the payment of his debts (*y*). The Bankruptcy Act, 1883, however, expressly provides, that the tools of a bankrupt's trade, and the necessary wearing apparel of himself, his wife, and children, to a value (inclusive of tools, apparel and bedding) of the sum of 20*l*., shall not vest in the trustee (*z*); and any property in the possession of the bankrupt as a mere collector or officer of a Friendly or other like society must, on demand, be returned by the trustee in bankruptcy, in preference to all other claims (*a*).

When any property of the bankrupt, acquired by the trustee, consists of land of any tenure burthened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of money, the trustee may, at any time within twelve months from the date of his appointment as trustee, and provided he shall not have omitted for twenty-eight days to reply to any due written inquiry made to him asking whether he intends to disclaim or not, by writing under his hand, *disclaim* such property,—but in the case of leases, not without the leave of the court, unless in the case of certain small bankruptcies (*b*). And such disclaimer, as from the date thereof, operates to determine the rights, interests, and liabilities of the bankrupt and of his property, in or in respect of the property disclaimed, and also discharges the trustee of all personal liability in

(*x*) Act of 1883, s. 53; *In re Wicks* (1881), 17 Ch. D. 70.

(*y*) Act of 1883, s. 52.

(*z*) Sect. 44.

(*a*) Friendly Societies Act, 1876, s. 15; Act of 1883, s. 40; *In re Miller, Ex parte Official Receiver*, [1893] 1 Q. B. 327.

(*b*) Act of 1883, s. 55: Rule 232, and see *In re Bastable*, [1901] 2 K. B. 518.

respect of the property disclaimed, as from the date when the property vested in him (*c*). It is sometimes very difficult to decide what effect a disclaimer of this kind has upon the rights of strangers ; but the Act of 1883 provides, generally, that any person injured by the operation of this enactment, shall be deemed a creditor of the bankrupt to the extent of such injury, and may prove the same as a debt (*d*) ; and, in particular, that as regards disclaimers of the leases of the bankrupt, the court may make an order for the vesting of such leases in anyone appearing to the court to be interested therein,—*e.g.*, an underlessee of the bankrupt or his mortgagee (whether by demise or by assignment),—provided that such underlessee or mortgagee will assent to undertake the liabilities incident to the lease, that is to say, such of them as would have attached to any absolute assignee of the lease under an express assignment thereof, which assignment is, for this purpose, to be deemed to have been executed at the date of the filing of the bankruptcy petition. But the vesting order may limit the liabilities aforesaid to the leaseholds comprised in the vesting order, *e.g.*, where these leaseholds are portion only of the property comprised in the original lease, or head-lease (*e*).

The appointment of the trustee of a bankrupt used to have a *retrospective* relation, so that the bankruptcy was deemed to have commenced at the time the debtor committed any act of bankruptcy within twelve months next preceding the order of adjudication; and thus it overreached and annulled all alienations and executions which were of a date subsequent to the commencement of the

(*c*) Act of 1883, s. 55, sub-s. (2).

(*d*) See *In re Hooley*, [1899] 2 Q. B. 579.

(*e*) Act of 1883, s. 55, sub-s. (7), amended by Act of 1890, s. 13 ; *Smalley* v. *Hardinge* (1881), 7 Q. B. D. 524 ; *Harding* v. *Preece* (1882), 9 Q. B. D. 281 ; *Ex parte Allen*, *In re Fussell* (1882), 20 Ch. D. 341 ; *In re Cock*, *Ex parte Shilson* (1887), 20 Q. B. D. 343; *In re Finley* (1888), 21 Q. B. D. 475.

bankruptcy (*f*). This, indeed, had been the principle of the bankrupt law ever since the time of Queen Elizabeth; and it prevailed, at that period, with an austerity which put wholly out of sight the consideration due to innocent parties, and the safety of commercial transactions (*g*). Under the Bankruptcy Act, 1869, however, its harshness was considerably obviated, protection having been extended by that Act to various *bonâ fide* transactions of the debtor, although they fell within the period covered by the relation back of the trustee's appointment. And now, by the Bankruptcy Act, 1883, sect. 43, it has been provided, that the bankruptcy of any debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which the receiving order is made against him; or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition. And, under the Bankruptcy Act, 1890, sect. 20, where the adjudication follows upon a receiving order made in lieu of a committal order under sect. 103 of the Bankruptcy Act, 1883, the bankruptcy relates back to, and commences at, the time of such order, or (in the case of any previous act of bankruptcy) the time of the first of such acts within three months next preceding the date of the receiving order.

But it is provided by the Bankruptcy Act, 1883, that (subject to the provisions hereinafter mentioned regarding certain executions, and regarding the avoidance of voluntary settlements and fraudulent preferences) the following

(*f*) Act of 1869, s. 11; *Lomax* v. *Buxton* (1871), L. R. 6 C. P. 107; *Re Campbell, Ex parte Wolverhampton Banking Company* (1884), 14 Q. B. D. 32.

(*g*) 2 Bl. Com. 486.

transactions with the debtor shall be good, notwithstanding they may fall within the period covered by the relation back (*h*), that is to say—(1) Any payment by the bankrupt to any of his creditors; (2) Any payment or delivery to the bankrupt; (3) Any conveyance or assignment by the bankrupt for valuable consideration; and (4) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration; provided that both the following conditions are complied with, namely—(1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, must have taken place before the date of the receiving order; and (2) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction, was made, executed, or entered into, must not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, have had notice of any available act of bankruptcy committed by the bankrupt before that time. And with regard to executions, whether by *fieri facias* against the goods, or by *elegit* against the lands, or by garnishee order, the Act provides (*i*), in particular, that these shall in general hold good, if perfected before the date of the receiving order, and before notice of the presentation of any petition by or against the debtor, or of the commission of any act of bankruptcy by him,—an execution against land being perfected upon the seizure thereof (if legal), or upon the appointment of a receiver thereof (if equitable), and an execution against goods being perfected by seizure and sale (subject as to executions under judgments for more than 20*l.* to the requirement hereinafter referred to) (*k*), and a garnishee order being perfected by the receipt of the debt.

There are cases, however, in which transactions are void

(*h*) Sect. 49; see *In re Wright* (1876), 3 Ch. D. 70.

(*i*) Sect. 45; *Ex parte Sulger, In re Chinn* (1881), 17 Ch. D. 839; *Hood* v. *Newby* (1882), 21 Ch. D. 605; *In re Ford, Ex parte Official Receiver*, [1900] 1 Q. B. 264.

(*k*) Pp. 210, 211.

as against the trustee, even independently of the doctrine of relation. For, first, as regards fraudulent conveyances, the trustee's title will prevail against all dispositions of property, under colour either of alienation or of legal execution, which are not *bonâ fide*, but of a merely feigned or collusive character, whether a prior act of bankruptcy has been committed or not (*l*). It will prevail, also, against all alienations and payments voluntarily (that is to say, without pressure) made by the debtor shortly before his bankruptcy, with the intention of giving a preference to some particular creditor or creditors (*m*). For a transaction of this kind evidently tends to defeat the main principle of the bankruptcy law (*n*); and an express provision is accordingly inserted in the Bankruptcy Act, 1883, similar to one in the Bankruptcy Act, 1869, to the following effect:—that every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by a person unable to pay his debts as they become due from his own moneys, in favour of any creditor, or of any trustee for such creditor, *with a view to giving such creditor a preference over the other creditors*, shall, if the insolvent become bankrupt on a petition presented within three months afterwards, be deemed fraudulent and void as against the trustee. But this section is not to affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt (*o*).

And secondly, as regards executions, the Act of 1883 provides, that where goods have been taken in execution

(*l*) *Jackson* v. *Irvin* (1809), 2 Camp. 48.

(*m*) *Atkinson* v. *Brindall* (1835), 2 Bing. N. C. 225; *Strachan* v. *Barton* (1856), 11 Exch. 647.

(*n*) *Linton* v. *Bartlett* (1770), 3 Wils. 47.

(*o*) Sect. 48; *Tomkins* v. *Saffery* (1877), L. R. 3 App. Ca. 213; *Ex parte Stubbins, In re Wilkinson* (1881), 17 Ch. D. 58.

and sold for a judgment above 20*l.*, or (by the Bankruptcy Act, 1890, s. 11) where money has been paid in order to avoid a sale of the goods, the trustee, on giving notice of the bankruptcy *within fourteen days from such sale* or payment, shall be entitled to claim the sale proceeds less the sheriff's expenses. And if the goods have not been actually sold, the goods are to be handed over to the trustee, subject to a charge thereon for the sheriff's expenses,—this latter provision not being confined to executions for 20*l.*, but applying to all executions whatsoever. But a purchaser in good faith from the sheriff acquires a good title as against the trustee in bankruptcy (*p*).

And thirdly, as regards voluntary settlements, it is enacted, that every settlement (including every conveyance or transfer) of property made by a debtor, not being a settlement made before and in consideration of marriage, or in favour of a purchaser or incumbrancer, *bonâ fide* and for valuable consideration, or a settlement on wife or children of property accruing after marriage in right of the settlor's wife, shall, if the settlor become bankrupt within two years after its date, be absolutely void as against his trustee ; and shall, if he become bankrupt within ten years, be also void against the trustee, unless the parties claiming under the settlement can prove that at the time it was made the settlor was solvent without the aid of the property settled, and that the interest of the settlor passed to the trustees of the settlement on the execution thereof (*q*). Moreover, any covenant or contract made in consideration of marriage, for the future settlement on the settlor's wife or children of property wherein at the date of his marriage the settlor

(*p*) Sect. 46; *In re Hinks, Ex parte Berthier* (1878), 7 Ch. D. 992; *In re Pearce, Ex parte Crosthwaite* (1885), 14 Q. B. D. 966.

(*q*) Act of 1883, s. 47; *Ex parte Dawson* (1875), L. R. 19 Eq. 433.

had no estate or interest, and not being property coming to him in right of his wife, will, upon his becoming bankrupt before such property has been actually transferred or paid pursuant to such contract or covenant, be void as against his trustee (*r*).

The chief duties of the trustee consist in realising and distributing the property of the debtor ; and he is, from time to time, to declare a dividend amongst the creditors (*s*), that is to say, he is to declare what payment shall be made to them out of the balance then at the bank to the credit of the Bankruptcy Estates Account. For he is required to pay, into an account so designated, all sums from time to time received by him, at such local bank as the committee of inspection shall apppoint, and, failing such appointment, at the Bank of England (*t*). And with regard to the payment of dividends, the Act provides, that, subject to the retention of such sums as may be necessary for the costs of administration, or otherwise, the trustee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts ; that the first dividend, if any, shall be declared and distributed within four months after the conclusion of the first meeting of creditors, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing the declaration to a later date ; that subsequent dividends shall, in the absence of sufficient reason to the contrary, be declared and distributed at intervals of not more than six months (*u*) ; and that when the trustee has realised all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realised without needlessly protracting the trusteeship, he shall declare a final dividend. But before so doing, he is to give notice, in the prescribed manner, to the persons whose claims to

(*r*) Sect. 47, sub-s. (2) ; *In re Roberts* (1882), 21 Ch. D. 553.
(*s*) Sects. 58—63.
(*t*) Sect. 74.
(*u*) Sect. 58.

be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the court within a time limited by the notice, he will proceed to make a final dividend without regard to their claims (*x*); and on the expiration of the time so limited, or of any extension thereof that may have been granted to any claimant, the remaining assets of the debtor are divided amongst the creditors who have proved their debts, without regard to the claims of any other persons. If any surplus remains after paying every creditor in full, with interest where that is allowed (*y*), and after paying the costs, charges, and expenses of the administration, that surplus belongs to the bankrupt (*z*).

Dividends are paid rateably among all the creditors, according to the *quantity* of their debts, no regard being in general had to the *quality* of them. Hence, judgments and recognizances, and other debts by record or specialty, are all put on a level with debts by mere simple contract; and equitable debts are on the same footing as legal debts. But a creditor, who has a specific security on the property of the bankrupt (such as a mortgage or pledge) is entitled, notwithstanding the bankruptcy, either to give up his security and prove for his whole debt, or else to realise such security, or give credit for its value, and to prove and receive a dividend *pari passu* with the other creditors in respect of any overplus remaining unpaid (*a*). So a landlord, who is desirous, after the commencement of the bankruptcy, to distrain for rent on the bankrupt's goods, is entitled to make such distress available for his separate payment to the extent of half a year's rent accrued due prior to the date of the order of adjudication (*b*), though

(*x*) Sect. 62.

(*y*) Sect. 40, sub-s. (5); First Schedule, rule 20.

(*z*) Sect. 65.

(*a*) Sects. 6, 39; Second Sched., rules 9—17; *In re Turner* (1881), 19 Ch. D. 105.

(*b*) Sect. 42; Act of 1890, s. 28; *Ex parte Voisey, In re Knight* (1882), 21 Ch. D. 442.

for the remainder he must come in *pari passu* with the rest of the creditors (*c*). And to this we may add, that a priority is given (and to some extent even as against the landlord's preferential right of distress) to parochial and other local rates, and to any assessed, land, property, or income tax due from the bankrupt, to the extent of one year's assessment; and also to the wages or salaries of the debtor's clerks or servants, not exceeding 50*l*., and due in respect of services rendered during the four months before the date of the receiving order; and also to the wages of any labourer or workman, not exceeding 25*l*., due in respect of services rendered during the two months before the date of the receiving order,—all which last mentioned classes of debts are to be paid in full, if the property of the bankrupt is sufficient, and in priority to all others (*d*), but are to abate *inter se* if the property of the bankrupt is insufficient for their payment. With these exceptions, and with the exception of the debts which under the provisions of the Partnership Act, 1890, are only to be paid after all other debts for value have been satisfied in full (*e*), and of a debt for money lent by a wife to her husband in trade, with respect to which the Married Women's Property Act, 1882, contains a like provision (*f*), all debts proveable under the bankruptcy are to be paid *pari passu*.

And with regard to the distribution of the bankrupt's estate, it is to be further observed, that demands in the nature of unliquidated damages, arising otherwise than by reason of a contract, promise, or breach of trust, are *not* proveable in the bankruptcy (*g*); and that no person having notice of any act of bankruptcy available against the bankrupt can prove for any debt or liability contracted by

(*c*) Act of 1883, s. 42; *Paull* v. *Best* (1863), 3 B. & S. 537.

(*d*) Sect. 40; 51 & 52 Vict. (1888) c. 62.

(*e*) *Supra*, p. 138.

(*f*) Sect. 3; *In re Cronmire*, [1901] 1 K. B. 480.

(*g*) Act of 1883, s. 37, subs. (1); see *Ex parte Baum* (1874), L. R. 9 Ch. App. 673; *Watson* v. *Holliday* (1882), 20 Ch. D. 780.

the bankrupt subsequently to the date of such notice having been received (*h*). With these exceptions, however, all debts and liabilities, present or future, certain or contingent to which the bankrupt is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred previously to such date, may be proved (*i*). And where the debt or liability does not bear a certain value, by reason of its being subject to any contingency, as, for instance, that of a widow marrying again, or for any other reason, the Act directs, that the debt or liability shall (where possible) be estimated by the trustee, and, in case of dispute, according to the order of the court, either with or without the intervention of a jury ; and the proof is to be for the sum thus assessed (*k*). The term "liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, agreement, contract, or undertaking, whether likely or not to occur before the close of the bankruptcy, and, generally, any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of, money or money's worth, whether fixed or unliquidated, present, future or contingent, and whether capable of being ascertained by fixed rules or by jury only, or as a matter of opinion (*l*).

V. *The bankrupt's discharge.*—To every bankrupt who conforms in all points to the directions of the statute, the law makes full amends for all this rigour and severity; for he may, at any time after being adjudged bankrupt, apply to the court for his *order of discharge.* This application will be heard in open court as soon as conveniently can

(*h*) Act of 1883, s. 37, sub-s. (2).

(*i*) *Ibid.* sub-s. (3).

(*k*) *Ibid.* sub-ss. (4), (7) ; *Ex parte Blakemore* (1877), 5 Ch. D. 372.

(*l*) *Ibid.* sub-s. (8).

be after his public examination is concluded, but not before (*m*); and, on the hearing of the application, the court may grant the bankrupt an absolute order of discharge, the effect of which will be to release him from all debts and liabilities whatever which are proveable under the bankruptcy, save only such as were incurred or forborne by means of fraud or *fraudulent* breach of trust, or such as are due to the Crown, or incurred for some offence against the revenue laws, or as estreated bail for any person charged with such offence (*n*); or, under the Bankruptcy Act, 1890, s. 10, his liability on a judgment for seduction, or under an affiliation order, or upon a judgment against him as co-respondent in a divorce action. A bankrupt, duly discharged, is morever entitled (when the discharge is absolute and unconditional) to enjoy, free from the claims of his creditors (other than those before mentioned as continuing, and other than his new creditors), all future acquisitions of property; so that, in the language often applied to the case of a discharge under former statutes, "he becomes a clear man again" (*o*), subject only to continuing to give to the trustee such assistance as may be required for the realisation and distribution of his former property, failing which his discharge may be revoked (*p*). In all which respects, the order of discharge appears to have the same effect as the so-called *certificate of conformity* which used to be granted to bankrupts under the earlier Bankruptcy Acts, or as the *order of discharge* (in the case of bankruptcy properly so called) and the *certificate of discharge* (in the case of liquidating debtors) formerly granted under the Bankruptcy Act, 1869 (*q*). But it is hardly necessary to observe, that the

(*m*) Sect. 28, rr. 178—182; Act of 1890, s. 8.

(*n*) Act of 1883, s. 30; *Cooper* v. *Prichard* (1883), 11 Q. B. D. 351.

(*o*) *Ebbs* v. *Boulnois* (1875), L. R. 10 Ch. App. 479; *In re Pettitt's Estate* (1876), 1 Ch. D. 478.

(*p*) Act of 1890, s. 8, sub-s. (8).

(*q*) *Bousfield* v. *Dove* (1884), 27 Ch. D. 687.

bankrupt's discharge does not free from liability any surety for, or co-surety or co-contractor with, the bankrupt, or any partner of the bankrupt; though, on the other hand, the bankrupt cannot, by any promise of his, revive a debt from which he has been duly discharged, whether by order of discharge, or by certificate of discharge or of conformity (*r*).

But the bankrupt is not, as a matter of course, entitled to the absolute and unconditional order of discharge above referred to. For the court takes into consideration the report of the official receiver as to the bankrupt's conduct and affairs (including a report as to his conduct during the bankruptcy proceedings); and the court *may* refuse the absolute order of discharge, or suspend the operation of such an order for a specified time, or grant the order subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property; and the court *must* refuse the order of discharge in all cases where the bankrupt has committed any misdemeanor of the class already specified (*s*). And further, the court *must* either refuse the order, or at least suspend the operation of it for a period of not less than two years or until a dividend of not less than 10*s*. in the pound has been paid to the creditors, or grant the order subject to such conditions as aforesaid, or require the bankrupt (as a condition of his discharge) to consent to judgment being entered up against him for any unsatisfied balance of the debts proveable, such judgment to be satisfied out of his future earnings and after-acquired property, — upon proof — (1) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business trans-

(*r*) Act of 1883, s. 30, sub-s. (4); *Rimini* v. *Van Praagh* (1872), L. R. 8 Q. B. 1; *Elmslie* v. *Corrie* (1878), 4 Q. B. D. 295; *Ex parte Barrow*, *In re Andrews* (1881), 18 Ch. D. 464.

(*s*) *Supra*, pp. 201—203.

actions and financial position within the three years immediately preceding his bankruptcy: or (2) That the bankrupt has continued to trade after knowing himself to be insolvent: or (3) That the bankrupt has contracted any debt proveable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it: or (4) That the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living: or (5) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him: or (6) That the bankrupt has, within three months preceding the date of the receiving order, and when unable to pay his debts as they become due, given an undue preference to any of his creditors: or (7) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a composition or arrangement (statutory or otherwise) with his creditors: or (8) That the bankrupt has been guilty of any fraud or fraudulent breach of trust (*t*): or (under the Bankruptcy Act, 1890) upon proof (9) That the bankrupt's assets are not of a value equal to 10*s*. in the pound on the amount of his unsecured liabilities, such deficiency of value not being shown to have proceeded from justifiable causes: or (10) That the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities: or (11) That the bankrupt has, within three months preceding the date of the receiving order, incurred unjustifiable expense by bringing a frivolous or vexatious action: or (12) That the bankrupt has, within three months preceding the date of the receiving order, incurred liabilities with a view of making his assets equal to 10*s*. in the pound on the amount of his unsecured liabilities. Also, where before his marriage the debtor

(*t*) Act of 1883, s. 28; *Ex parte Campbell* (1885), 15 Q. B. D. 213.

has made a settlement, or entered into a covenant to settle property, on his wife and children, when he was not really in a position to do so, and such settlement or covenant was in reality designed to defeat or delay his creditors, the order of discharge may be either refused or suspended (*u*); and it is an express provision of the Bankruptcy Act, 1883 (*x*), that an undischarged debtor who has been adjudged bankrupt under that Act shall be guilty of a misdemeanor under the Debtors Act, 1869, and be punishable accordingly, if he obtains credit to the extent of 20*l.* or upwards from any person without informing such person that he is an undischarged bankrupt.

Upon the expiration of two years from the date of a conditional order of discharge, if the bankrupt satisfies the court that there is no reasonable probability of his being in a position to comply with the conditions annexed to his discharge, the court may grant him his discharge or otherwise modify the conditions thereof (*y*); and the disqualifications attaching to a bankrupt under the Bankruptcy Act, 1883, sect. 32,—viz., his incapacity to hold certain offices,—are not now to continue for more than five years from the date of the order of discharge (*z*). Also, by the Bankruptcy (Discharge and Closure) Act, 1887 (*a*), sects. 2—4, specific provision has been made,—(1) For the discharge of bankrupts under the Bankruptcy Act, 1869, or any prior Act or Acts, who have not obtained their discharge under these Acts; (2) For the closing of unclosed bankruptcies under the Bankruptcy Act, 1869; and (3) For superseding the old creditors' assignee (under the Bankruptcy Acts prior to 1869), by the appointment of an official assignee in his place. But the official assignee is (in such cases) exempt from all liability for the acts or neglects of the trustee or assignee whom he supersedes (*b*); and he may (as may also any

(*u*) Act of 1883, s. 29.
(*x*) Sect. 31.
(*y*) Act of 1890, s. 8.
(*z*) *Ibid.* s. 9.
(*a*) 50 & 51 Vict. c. 66.
(*b*) Sect. 6.

ordinary trustee in bankruptcy) in due course obtain his release (*c*), and the due remuneration for his services in connection with the bankruptcy (*d*).

VI. *Compositions and schemes of arrangement.*—Having now given some account of the existing system under which the law of bankruptcy is administered, we will conclude the chapter by some explanation of an alternative method of proceeding, which is to some extent recognised by the Bankruptcy Act, 1883, and which has always been in very extensive use, being found in some respects more convenient than a bankruptcy. And we will first premise generally, that, although the machinery adopted for this alternative method differs in some of its details from that which has been devised for a bankruptcy, the general principles of the law of bankruptcy are applicable to it. For it has been expressly provided, by the Bankruptcy Act, 1883, that the trustee under a *composition* or *scheme of arrangement* under that Act shall have the same powers and perform the same duties as a trustee under a bankruptcy; that the property of the debtor shall be distributed in the same manner as in a bankruptcy; and, generally, that all the provisions of that Act with reference to bankruptcy, shall apply (*mutatis mutandis*) to such a composition or scheme of arrangement (*e*).

It has always been considered within the true spirit of our modern bankrupt laws to provide a means for carrying into effect any amicable arrangements between a debtor and his creditors; and such arrangements have, in general, been free from any external interference, excepting so far as the prevention of fraud and the interests of commercial morality have otherwise seemed to require, *e.g.*, a debtor who has no assets at all cannot, in common

(*c*) Act of 1883, s. 82; Act of 1887, s. 6.

(*d*) Act of 1883, s. 72; Act of 1890, s. 15.

(*e*) Act of 1883, s. 18, subss. (12), (13).

reason or justice, be permitted to escape by any such arrangement (*f*).

Two methods of proceeding by arrangement, or (as the phrase is) by *composition* or *scheme of arrangement*, have accordingly been authorised by the legislature; and these are either before adjudication or after adjudication,—the former being under sect. 18 of the Bankruptcy Act, 1883, as amended by sect. 3 of the Bankruptcy Act, 1890, and the latter being under sect. 23 of the Bankruptcy Act, 1883.

First, *before* the debtor has been adjudged a bankrupt, the Acts provide, that when a debtor intends this sort of arrangement, he shall, within five days of submitting his statement of affairs, lodge with the official receiver his proposal to that effect. Thereupon the official receiver is to hold a meeting of the creditors before the public examination is concluded (first sending to each creditor a copy of the debtor's proposal); and the creditors may, at the first meeting or any adjournment thereof, resolve to entertain the proposal, or any amended proposal or scheme of arrangement of the debtor's affairs. But the scheme is not to be binding on the creditors, unless it is carried by a resolution passed by a majority in number representing three-fourths in value of all the creditors who have proved; nor unless it is approved by the court, the application for that purpose being made either by the official receiver or by the debtor. Such application is not to be heard until after the public examination is concluded; but no subsequent meeting for the purpose of confirming the resolution appears now to be necessary.

The court is required, before approving a composition or scheme, to hear a report of the official receiver as to its terms, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any

(*f*) *Ex parte Aaronson* (1878), 7 Ch. D. 713; *Ex parte Ball, In re Parnell* (1882), 20 Ch. D. 670; *Ex parte Campbell* (1885), 15 Q. B. D. 213.

creditor; and no composition or scheme is to be approved which does not provide for the payment, in priority to other debts, of all debts directed to be so paid in the distribution of the property of a bankrupt. If the court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the court is required under the Act, when the debtor is adjudged bankrupt, to refuse his dicharge, the court *must* refuse to approve the composition or scheme. Also, if any such facts are proved as would under the Act *justify* the court in refusing, qualifying, or suspending the debtor's discharge, the court must (unless reasonable security is given for the payment of 7*s.* 6*d.* in the pound on the unsecured debts) refuse to approve the composition or scheme. And in all other cases, the court *may*, in its discretion, refuse to approve the composition or scheme (*g*).

If the court approves the composition or scheme, the approval may be signified by the order of the court, or by the seal of the court being attached to the proposal; and the composition or scheme so approved is binding on all the creditors so far as relates to any debts due to them from the debtor and proveable in bankruptcy. It operates to release the debtor to the same extent as (but not further or otherwise than) the like order of discharge would release him; and the provisions of the composition or scheme may thereafter be enforced by the court, on application by any person interested, and any disobedience to an order of the court made on the application is deemed a contempt of court. But if default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the court, on satisfactory evidence, that the composition or scheme cannot, in consequence of legal difficulties or for any sufficient cause,

(*g*) *Ex parte Campbell* (1885), 15 Q. B. D. 213; *Ex parte Milner, In re Milner*, *ib.* 605; *In re E. A. B.*, [1902] 1 K. B. 457.

proceed without injustice, or undue delay, to the creditors or to the debtor, or that the approval of the court was obtained by fraud, the court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, without prejudice to anything that may in the meantime have been done under the composition or scheme (*h*).

Secondly, *after* the debtor has been adjudged a bankrupt, the Act provides, that the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken, and the same consequences shall ensue, as in the case of a composition or scheme accepted before adjudication. If the court approves the composition or scheme, it may make an order annulling the bankruptcy, and vesting the property of the bankrupt in him or in such other person as the court may appoint, on such terms, and subject to such conditions, if any, as the court may declare. But if default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the court was obtained by fraud, the court may, if it thinks fit, on the application of any person interested, re-adjudge the debtor bankrupt, and annul the composition or scheme, without prejudice to anything that may in the meantime have been done under it (*i*).

Under the former bankruptcy law, as established by the Bankruptcy Act, 1869, the special resolution of the creditors, for liquidating the affairs of the debtor other-

(*h*) Act of 1883, s. 18 (11); *Bramble* v. *Moss* (1868), L. R. 3 C. P. 458; *Ex parte Cheney*, *In re Dempster* (1878), 9 Ch. D. 701.

(*i*) Act of 1883, s. 23.

wise than in bankruptcy, was required to be presented to the registrar, who registered it, on being satisfied that it was *bonâ fide* and had been passed as directed by the Act (*k*). Until such registration, the resolution was of no validity; but when registered, it was binding on all the creditors whose names and addresses and the amount of the debts due to them were set down in the statement of the debtor produced at the meeting at which the resolution was passed, and, being registered, it was summarily enforceable by the Court of Bankruptcy (*l*). But under the present bankruptcy law, where a composition or scheme has been approved by the court, the approval being (as we have seen) testified either by the seal of the court being attached to the proposal, containing its terms, or by these terms being embodied in the order of the court, the provisions of the scheme become thereby summarily enforceable; and no registration of the resolution itself seems now to be required, or necessary for any purpose.

The statutory arrangement arrived at, or composition accepted, under the provisions of the Bankruptcy Acts, 1883—1890, is to be distinguished from a debtor's deed of arrangement or composition *at the common law*, in respect that the latter arrangement or composition is not binding on the minority, even although accepted by a majority of the creditors (*m*); and in respect that, not being sealed with the seal of the court, or embodied in an order of the court, it is not summarily enforceable. Every such deed of arrangement or composition at the common law is, however, now described as a "Deed of Arrangement," and as such is required to be registered (*n*). Still, no provision appears to have been made for summarily enforcing it, although the registration thereof may be

(*k*) Act of 1869, s. 126; *In re Page* (1876), 2 Ch. D. 323.

(*l*) *Breslauer* v. *Brown* (1878), L. R. 3 App. Ca. 672.

(*m*) *Sibree* v. *Tripp* (1846), 15 M. & W. 23.

(*n*) 50 & 51 Vict. c. 57 (Deeds of Arrangement Act, 1887), s. 5.

rectified on summary application; but, as we have already mentioned above (*o*), the fact of such a deed of arrangement having been entered into by the debtor, is (equally with a statutory composition or scheme of arrangement) an element for the consideration of the court, on the debtor's application for his discharge in any subsequent bankruptcy (*p*).

(*o*) *Supra*, p. 218.

(*p*) 50 & 51 Vict. (1887) c. 57, s. 16.

CHAPTER VII.

OF TITLE BY WILL AND BY ADMINISTRATION.

We now proceed to consider the two methods of acquiring property by *will* and by *administration*; and these we shall consider in one and the same chapter, they being in their nature sufficiently connected for this purpose.

When considering the law of devises with reference to *real estate*, our attention was directed to the subject of wills or testaments; and we were led on that occasion to expound the nature and origin of testamentary dispositions in general, and to notice a variety of matters respecting wills which it may be material to recall thus generally to the reader's recollection, but which it is not necessary to repeat (*a*). Our present object is to treat exclusively of a will or of an administration considered as a method of acquiring title to *personal estate*, including chattels real, which subject until recently belonged (by an anomaly peculiar to our law) to the jurisdiction of the Ecclesiastical Courts, but has been now transferred to the Probate Division of the High Court of Justice, the successor of the Court of Probate, a new secular court established by the Court of Probate Act, 1857.

It is proposed, first, To trace the history of the title to personal estate by will and by administration; secondly, To show the manner of making a will, and its requisites, when considered as a disposition of personal estate; thirdly, To show the manner of granting an administration; and, lastly, To select some few of the general heads appertaining to the office and duty of executors and administrators.

(*a*) *Vide supra*, bk. II., pt. I., ch. XX.

1. [Though wills operating on personalty have been of immemorial use in England, it is to be understood that this power of bequeathing did not extend originally to *all* a man's personal estate. On the contrary, Glanville informs us that, by the law as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts; of which one went to his lineal descendants, another to his wife, and the third only was at his own disposal. Or, if he died without a wife, he might then have disposed of one moiety, and the other moiety went to his children. And so *è converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other. But if (and only if) he died without either wife or issue, the whole was at his own disposal (*b*). The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them (*c*).

This continued to be the law of the land at the time of Magna Carta (*d*); which provided that the king's debts should first of all be levied, and then that the residue of the goods should go to the executor to perform the will of the deceased, saving to the widow and children their reasonable parts,—"*salvis uxori ipsius et pueris suis rationabilibus partibus suis*" (*e*). In the reign of King Edward the Third, this right of the wife and children was still held to be the universal or common law (*f*), though frequently pleaded as the local custom of Berks, Devon, and other counties (*g*); and Bracton lays down the doctrine of the "reasonable part" to be the common law, in a passage which appears to have been misunderstood by Sir Edward Coke (*h*). Also Glanville, Magna Carta, Fleta, the Year

(*b*) L. 7, ch. 5; Bracton, l. ii. ch. 26; Flet. l. ii. ch. 57.

(*c*) F. N. B. 122.

(*d*) See cap. 26 (ed. Stubbs).

(*e*) *Ibid.*

(*f*) M. 30 Edw. 3, 25; H. 17 Edw. 3, 9.

(*g*) Reg. Brev. 142; Co. Litt. 176.

(*h*) L. ii. ch. 26, s. 2; 2 Inst. 33.

[Books, and Fitzherbert, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law ; and in the reign of Charles the First, Sir Henry Finch lays it down, expressly, to be the general law of the land (*i*). The like law appears to have obtained (and still to obtain) in the law of Scotland, the widow's share being there called her *jus relictæ*, and the children's share their *legitim* (*k*), upon an apparent analogy to the *quarta legitima* of the Roman law (*l*).

But in England the common law in this particular has been now completely altered, although by imperceptible degrees ; and a man may now bequeath, and for a long time has been able to bequeath, the whole of his goods and chattels to whomsoever he will. The restricted power of bequest continued, however, in the province of York, the principality of Wales, and the city of London, until quite modern times ; but was eventually abolished, by the 4 W. & M. (1692) c. 2, (explained by the 2 & 3 Anne (1703), c. 5), for the province of York ; by the 7 & 8 Will. III. (1696) c. 38, for the principality of Wales ; and by the 11 Geo. I. (1724) c. 18, for the city of London, these several statutes having successively enacted, that persons within those districts, and liable to their customs, might (if they thought proper) dispose of *all* their personal estates by will, whereby the claims of the widow, children, and other relations to the contrary were totally barred. However, even after this uniformity was introduced, every testator was bound (or at least was, by the custom of many places, originally bound) to remember his lord and the church, by leaving to them respectively his two best chattels, which was the original of heriots, and of mortuaries ; and then (and then only) he was left free to bequeath the remainder as he pleased.

(*i*) Finch, *Discourse*, 175.

(*k*) Dalrymple, *Feudal Property*, 145 ; Ersk. *Inst.* b. iii. tr. 9, s. 15.

(*l*) Inst. l. ii. t. 18, *De Inofficioso Testamento.*

[Where a man made no disposition of such of his goods as were testable, he was said to die *intestate*; and in such case, it is said, that, by the old law, the king, as *parens patriæ*, was entitled to seize upon his goods (*m*). This prerogative the king continued to exercise for some time through his ministers of justice; but more commonly, he granted the franchise to lords of manors and others, who accordingly long enjoyed a prescriptive right to grant administration to their intestate suitors, in their own courts baron and other courts; or to have the wills of such suitors there proved, in case they made testamentary dispositions (*n*). Afterwards the Crown, in favour of the church, invested divers prelates with this branch of his prerogative, which was done, saith Perkins, because it was intended by the law, that spiritual men were of better conscience than lay men, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased (*o*). The goods, therefore, of intestates were in this manner given to the ordinary, that is, to the ordinary ecclesiastical judge of the place; who was (generally speaking) the bishop of the diocese. And he might seize the goods, and keep them without wasting, and might also give, aliene, or sell them at his will, and dispose of the money *in pios usus*; but, if he did otherwise, he broke the confidence which the law reposed in him (*p*). So that, properly, the whole interest and power thus given or granted to the ordinary, was but that of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such uses as the zeal of the times denominated pious (*q*). And, as the ordinary had thus the administration of the effects of intestates, a jurisdiction in the matter of wills, also, of course, followed; for it was thought just and natural, that the will of the deceased should be proved to the satisfaction

(*m*) *Hensloe's Case* (1600), 9 Rep. 38.
(*n*) *Ibid.* 37 b.
(*o*) S. 486.
(*p*) Finch, *Discourse*, 173, 174.
(*q*) Plowd. 277.

[of the prelate whose right of distributing the dead man's chattels was superseded thereby.

The goods of the intestate being thus vested in the ordinary, the prelates were originally accountable only to God and to themselves (*r*). This led to abuse even in Fleta's time (*s*) ; and the abuse appears to have been carried to a great length (*t*), so much so that the clergy in fact appropriated to themselves (under the name of the church and the poor) the whole residue of the deceased's estate, after the *partes rationabiles* of the wife and children, without paying the lawful debts of the deceased at all. For which reason it was enacted, by the statute of Westminster the Second (*u*), that the ordinary should be bound to pay the debts of the intestate, so far as his goods extended, in the same manner that executors were bound in case the deceased had left a will. But inasmuch as, after that statute, the *residuum*, after payment of the debts, still remained in the hands of the priests, to be applied to whatever purposes the conscience of the ordinary approved, therefore the legislature again interposed, to prevent the ordinaries from keeping administrations in their own hands, or in those of their dependents ; and by the 31 Edw. III. (1357) c. 11, the ordinary was required, in case of intestacy, to depute the nearest and most lawful friends of the deceased to administer his goods. And these administrators were put upon the same footing, with regard to suits and to accounting, as executors appointed by will ; and that was the original of *administrators*, who were formerly but the officers of the ordinary, appointed by him in pursuance of this statute.

The 31 Edw. III. c. 11, as will have been observed, singled out the *next and most lawful* friends of the intestate ; and these were interpreted to be the *next of blood* under no legal disabilities (*x*). But afterwards the

(*r*) Plowd. 277.
(*s*) L. ii. ch. 57, s. 10.
(*t*) Decretal, l. v. t. 3, ch. 42.
(*u*) 13 Edw. 1 (1285), c. 19 ; *Snelling's Case* (1595), 5 Rep. 83 a.
(*x*) *Hensloe's Case* (1600), 9 Rep. 39.

[21 Hen. VIII. (1529) c. 5, enlarged the power of the ecclesiastical judge, and permitted him to grant administration, *either* to the widow, *or* to the next of kin, or to both of them, at his own discretion; and, where two or more persons were in the same degree of kindred, gave the ordinary his election to accept whichever he pleased.]

Upon this footing stood the law of wills and of administrations, from at least as early as the commencement of the twelfth century, down to the year 1857, although in almost all other countries, these matters had come to be under the jurisdiction of the civil magistrates (*y*). But, in our own times, the opinion gradually obtained, that the subjects in question were not handled by the ecclesiastical courts as effectively, expeditiously, and cheaply as the interests of justice required; which opinion at length led to the introduction, by Act of Parliament, of a new system, whereby the jurisdiction which these courts had during some centuries enjoyed over wills and intestacies was wholly taken away. We are referring, of course, to the Court of Probate Act, 1857 (*z*), whereby, as amended by the 21 & 22 Vict. (1858) c. 95, and (for domiciled Scotchmen having pure personal estate in England) by the Confirmation of Executors (Scotland) Act, 1858, and the 22 Vict. (1859) c. 30, the jurisdiction in the matter of wills and intestacies (so far as concerned personal estate) was directed to be thenceforth exercised in the "Court of Probate," a new tribunal then created, of a secular character. And this jurisdiction was afterwards assigned to the Probate Division of the High Court of Justice by the Judicature Act, 1873 (*a*).

II. We shall now consider the manner and requisites of wills, regarded as dispositions of personal estate; and under this head we propose to consider these four matters, namely,—(1) the *capacity* to be a testator; (2) the

(*y*) 3 Bl. Com. 95, 97.
(*z*) 20 & 21 Vict. c. 77.
(*a*) 36 & 37 Vict. c. 66, ss. 3, 34.

solemnities required for the will; (3) the *appointment* of the executor; and (4) the *probate* of the will.

1. *The capacity of persons to be testators.*—As a rule, all persons are capable of being testators, save, of course, persons who labour under unsoundness of mind (whether total or partial) (*b*), or who by duress are restrained of their freedom of will, or who (as in the case of infants) are yet of immature will. As regards married women, they were (as a general rule) incompetent to make a will, and that purely by reason of their coverture; in which particular, our constitution differed materially from the civil law, according to which a married woman was fully competent to make a will (*c*). But with us it was otherwise; inasmuch as a married woman's personal chattels belonged in general to her husband, who might have disposed of them and also of her chattels real; so that the law could not consistently give her also a power of disposing of them, by will or otherwise, to another (*d*). Yet by her husband's licence or with his *assent*, she might have disposed of her personalty by will (*e*),—he assenting to the particular will (*f*),—whereby he waived his own general right of administering to his wife's effects. So that, unless he survived her, in which case only he would be her administrator, his assent was not sufficient (*g*).

But this rule as to the incapacity of married women was subject to exceptions. And first, the queen consort might dispose of her chattels by will, even without the consent of the king (*h*). Secondly, any married woman might make her will of goods which were in her possession *in auter droit*, as executrix or administratrix (*i*). Thirdly,

(*b*) *Smith* v. *Tebbitt* (1867), L. R. 1 P. & D. 398; *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549.

(*c*) Dig. 31, l. 77.

(*d*) 4 Rep. 51.

(*e*) Dr. & St. d. 1, ch. 7.

(*f*) Bro. Abr. *Devise*, 34; *Tucker* v. *Inman* (1842), 4 Man. & G. 1076.

(*g*) *Stevens* v. *Bagwell* (1808), 15 Ves. 153; *Re Atkinson*, [1899] 2 Ch. 1.

(*h*) Co. Litt. 133.

(*i*) Godolph. 1, 10.

a married woman might, under a *power* in that behalf conferred upon her, bequeath any property by will, her will in that case amounting to an appointment of the property in execution of the power (*k*). And a married woman may now by will dispose of any property belonging *to her for her separate use*, either under the provisions of the Married Women's Property Acts, 1870 and 1882 (*l*), or under the trusts of any instrument (*m*); and, inasmuch as the property of a married woman is, by virtue of the Married Women's Property Act, 1882, made her separate property in all cases in which it was acquired since 1882, or even previously, where she was married since 1882, she may now, more often than not, make a will of her property. Nevertheless, owing to the construction placed upon these provisions (*n*), it became necessary to provide, by the Married Women's Property Act, 1893 (*o*), that a married woman's power of making a will of separate property should apply whether she was or was not possessed of separate property at the time of making it, and such will should not require to be re-executed or republished after the death of her husband; thus enabling a married woman (as regards her separate property) to make a will exactly as a man would do, and exempting her from any necessity to re-execute the will when she is left a widow.

With regard to infants and the like, the incapacity to make a will in their case arises wholly from immaturity of age. The rule until a recent period was, that a male was competent to make a will of *personal* estate at the age of fourteen, and a female at twelve; but neither

(*k*) *Southby* v. *Stonehouse* (1755), 2 Ves. 610.

(*l*) 33 & 34 Vict. c. 93, ss. 1, 7; and 45 & 46 Vict. c. 75, ss. 1, 2, 5.

(*m*) *Peacock* v. *Monk* (1750), 2 Ves. sen. 191; *Taylor* v. *Meads* (1864), 24 L. J. Ch. 203.

(*n*) *In re Price* (1885), 28 Ch. D. 709; and previously *Willock* v. *Noble* (1875), L. R. 7 H. L. 580; *Dye* v. *Dye* (1884), 13 Q. B. D. 147.

(*o*) 56 & 57 Vict. c. 63, s. 3.

of them at an earlier period (*p*), which was also the regulation of the civil law. But it was expressly provided by the Wills Act, 1837, that the will of a person under twenty-one years of age should not be valid (*q*),—this provision referring, of course, to testators generally, and not to soldiers and sailors on actual service.

2. *The solemnities required for the execution of a will.*—Formerly, a testament (as regarded personal property) might be either *written* or *verbal* (otherwise called *nuncupative*), the former being *published* or declared by the testator as his written will, the latter being declared by the testator *in extremis* before a sufficient number of witnesses, and being only afterwards reduced into writing. But as nuncupative wills were liable to great impositions, and occasioned many surprises and perjuries, the Statute of Frauds (29 Car. II. (1677) c. 3) laid them under many restrictions, except when made by mariners at sea or by soldiers on active service (*r*); and indeed surrounded them by so numerous a train of requisites, that the things themselves fell into disuse long before they were expressly abolished. As regards *written* wills of *personal* estate, the general rule was, that no witnesses were required for their authentication (*s*); and if written in the testator's own hand (though it had neither his signature nor his seal, and although no witness had been present at its publication), the will was good, on proof of the handwriting merely (*t*). And even if written in another man's hand, and never signed by the testator, it was good, on proof that the writing was according to the testator's instructions, and had been approved by him (*u*). In all which particulars a will of pure personal estate differed

(*p*) Godolph. p. 1, ch. 8; Went. 212; Gilb. Eq. 74.

(*q*) 7 Will. 4 & 1 Vict. c. 26, s. 7.

(*r*) *Re Hiscocks*, [1901] P. 78.

(*s*) 2 Bl. Com. 501.

(*t*) Godolph. p. 1, ch. 21; Gilb. Eq. 260.

(*u*) Comyn, 452, 453, 454.

very considerably from a will of real estate; and eventually, therefore, the obvious improvement was introduced, of establishing one uniform rule, as regards solemnities and otherwise, for every will, whether of real or of personal estate. The Wills Act, 1837, accordingly requires, that every will (and also every codicil to a will) shall be a written instrument, signed by the testator (or by some other person in his presence and by his direction), and attested in his presence by two or more witnesses, present at the time of signing, no further or express publication of the will being required (*v*).

And with reference to the operation of a will on *personal* estate, it has been enacted, by the Wills Act, 1861 (*x*), but only as regards *pure* personal estate, that every will and other testamentary instrument made *within* the United Kingdom, by any British subject who shall die after the 6th August, 1861, shall be a valid will and be admitted to probate—whatever may be the testator's *domicile* either at the time of making the will or at the time of his death—provided only it be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same was made; and that every will made *out* of the United Kingdom by a British subject who shall die after the 6th August, 1861, shall be a valid will and be admitted to probate—whatever may be his *domicile* either at the time of making the will, or at the time of his death—provided only it be made according to the forms required either by the law of the place where it was made, or of the place of the testator's then domicile, or of his domicile of origin; importance being given to the testator's domicile, inasmuch as it is the domicile of a deceased intestate which in general determines the distribution of his personal estate (*y*).

(*v*) *Vide supra*, vol. I. p. 361.
(*x*) 24 & 25 Vict. c. 114.
(*y*) *Doglioni* v. *Crispin* (1866), L. R. 1 H. L. 301.

And no subsequent change of domicile is to render the will invalid (*z*).

3. *The appointment of the executor.*—In every will by which personal estate is bequeathed, an executor ought regularly to be appointed (*a*), although he is capable of being appointed either by express words or by clear implication (*b*). For the executor is he to whom the testator commits the execution of his last will and testament. All persons are capable of being executors who are capable of making wills, and many others besides; for infants,—nay (it is said) even an infant *en ventre sa mère* (*c*),—may be made executors; likewise married women, although, in their case, the husband might have refused to allow his wife to act, by reason of the liability which (prior to the Married Women's Property Act, 1882) he himself incurred for her devastavits (*d*), a reason which has now practically ceased to exist.

4. *The probate.*—The probate is the authentication of the will; and such authentication is essential to the completion of any title to be made under the will to the *personal* estate (including chattels real) comprised therein (*e*). In which respect a will of personal estate formerly differed from a will of real estate, no probate of the latter being required (*f*). But now, under the Land Transfer Act, 1897 (*g*), as regards the real estate (other than copyhold and customary-hold) to which the testator was entitled in fee simple for his own benefit, and under the Conveyancing Act, 1881 (*h*), as regards his

(*z*) 24 & 25 Vict. c. 114, s. 3; 24 & 25 Vict. c. 121.

(*a*) Went. *Off. Ex.* ch. 1; Plowd. 281.

(*b*) *Re William Bradley* (1883), 8 P. D. 215.

(*c*) West. *Symb.* p. 1, s. 635.

(*d*) *Pemberton* v. *Chapman* (1858), 1 Ell., Bl. & Ell. 1056; 45 & 46 Vict. c. 75, ss. 18, 23.

(*e*) *Doe* v. *Mew* (1837), 7 A. & E. 240; *Matson* v. *Swift* (1845), 8 Beav. 368.

(*f*) *Barraclough* v. *Greenhough* (1867), L. R. 2 Q. B. 612.

(*g*) 60 & 61 Vict. c. 65, s. 1.

(*h*) 44 & 45 Vict. c. 41, s. 30.

trust and mortgage estates, the will must be admitted to probate, in order that these estates respectively may vest in the executor; and probate (and letters of administration) may now be granted in respect of real estate only, although there is no personal estate.

The executor, if he accepted the office,—for of course he might in his discretion refuse to accept the office, that is to say, *renounce* the probate (*i*)—was required until recently, that is to say, until the Court of Probate Act, 1857, to prove the will (*i.e.*, obtain probate of the will) before the *ordinary*. And such proof was either in *common form*, which was upon the executor's own oath, before such ordinary or his surrogate; or *per testes*, in more solemn form of law,—which was only necessary when the proof was contested, by the entry of some *caveat*. For, in the absence of any contest, the probate was granted *ex debito justitiæ* (*k*). And when the will was so proved, the original was deposited in the registry of the ordinary; and a copy thereof on parchment was made out under his seal, and delivered to the executor, together with a certificate of its having been duly proved before him. And that official copy of the will was the *probate* thereof, as such term was commonly understood.

It is to be observed, however, that probate before the ordinary was, in general, the proper course, only in case all the goods of the deceased lay, at the time of his death, within one diocese. For if the deceased had *bona notabilia* (*i.e.*, chattels to the value of a hundred shillings) in two distinct dioceses, then the will had to be proved before the metropolitan of the province, by way of special prerogative (*l*), whence the courts of the metropolitan wherein

(*i*) *Venables* v. *East India Company* (1848), 2 Exch. 633; 20 & 21 Vict. (1857) c. 77, s. 79; 21 & 22 Vict. (1858) c. 95, s. 16.

(*k*) Godolph. vol. 1, ch. 20, s. 4; 3 Bl. Com. 98.

(*l*) 4 Inst. 335; 2 Bl. Com. p. 509; *Gurney* v. *Rawlins* (1836), 2 M. & W. 87; *Easton* v. *Carter* (1850), 5 Exch. 8; and 10 & 11 Vict. (1847) c. 98, s. 6.

such will was proved, and the offices of such courts, were called respectively the *prerogative courts*, and the *prerogative offices*, of the provinces of Canterbury and York respectively. And by means of such courts, the necessity for as many separate probates as there were dioceses was saved.

But, under the present system, the law as to *bona notabilia* is disused, the effect of the Court of Probate Act, 1857 (by which the jurisdiction of the Ecclesiastical Courts in these matters was taken away), being, that the whole jurisdiction and authority in relation to granting probates, and the depositing and preserving of the original wills, is now exercised without reference to the locality in which the property of the deceased may lie (*m*), though the distinction still obtains between proving a will in *common form*, and proving it in a case of *contention* (*n*). For there are subordinate jurisdictions throughout the country called "District Probate Registries," appointed severally for the districts set forth in a schedule to the Act, and each of them presided over by a "District Registrar"; and, in general, at the option of the parties interested, a will may be proved (or administration granted) either in London, or in the registry of the district in which the deceased had, at the time of his death, a fixed place of abode. But if the grant involves any matter of contention, then recourse must be had to the principal court itself (*o*). For the purpose of obtaining a grant of probate in common form, the applicant must now usually lodge the original will, an engrossment thereof to constitute the probate, an affidavit of estate (including real estate), and oath of executor, whereby he swears duly to administer.

And here we may conveniently observe, that even under the Court of Probate Act, 1857 (*p*), a devise of real estate

(*m*) 20 & 21 Vict. c. 77, s. 4.

(*n*) *Moore* v. *Holgate* (1866), L. R. 1 P. & D. 101; *Peacock* v. *Lowe* (1867), *ib.* 311.

(*o*) 20 & 21 Vict. c. 77, ss. 2, 46—48.

(*p*) 20 & 21 Vict. c. 77, s. 62.

might also be authenticated by the probate of the will; for if the will was proved in *solemn form*, then the probate was made conclusive evidence of the devise. And the Land Transfer Act, 1897, s. 2 (2) now provides, that all enactments and rules of law relating to the effect of probate and letters of administration as respects chattels real, and as respects the dealings with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties and liabilities of personal representatives in respect of personal estate, shall apply to real estate, so far as the same are applicable, as if that real estate were a chattel vesting in them or him; save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate.

Every probate (or now the affidavit used on the application for the grant) must be stamped with the proper stamp duty; and this stamp duty is now, by the Finance Act, 1894 (57 & 58 Vict. c. 30), converted into a duty called Estate Duty, as is more fully explained in the chapter on Death Duties in Volume I.

III. Our third head of enquiry is, the manner of granting *administration*. Until the change in the law to which we have already, more than once, adverted, if the deceased died intestate, then letters of administration were granted by the ordinary or else by the metropolitan, according to the distinctions with respect to *bona notabilia* already stated. But the grant is now made under the provision for that purpose contained in the Court of Probate Act, 1857, s. 4; and as to the person to whom the office of administrator is to be granted, the court follows, except under special circumstances, certain rules, which used to be obligatory also on the ordinary, that is to say,—

1. Administration of the goods and chattels of the wife

must be granted to the husband or his representatives (*q*); and administration of the husband's effects must be to the widow, or next of kin, but the court may grant it to either, or both, at its discretion (*r*). The court prefers, however, a sole administrator (*s*); and will not, as a rule, pass over the widow (*t*). 2. Among the kindred, those are to be preferred that are the nearest in degree to the intestate; but of persons in equal degree, the court may take which it pleases, and in general it will prefer males to females (*u*). 3. This nearness or propinquity of degree is reckoned according to the computation of the civilians, as expressed in the annexed Table (*x*); which allows one degree for each person in the line of descent, exclusively of him from whom the computation begins, and, in the direct line, counts the degrees from the deceased to his relative, but between collaterals, the sum of the degrees from the deceased to the common ancestor, and from the common ancestor to the relative. In which computation the civil law differs (as regards collaterals) from the canonists, who begin from the common ancestor and reckon downwards, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, consider them as related in that degree to each other (*y*). [And, therefore, in the first place, the children, or (on failure of children) the parents of the deceased are entitled to the administration: for though both children and parents are in the first degree, yet, with us, the children are allowed the preference (*z*). Then follow brothers and

(*q*) *Johns* v. *Rowe* (1628), Cro. Car. 106; Statute of Frauds (1677), s. 25; *Squib* v. *Wyn* (1717), 1 P. Wms. 381.

(*r*) *Fawtry* v. *Fawtry* (1692), 1 Salk. 36; Stra. 532.

(*s*) *Re Newbold* (1866), L. R. 1 P. & D. 285.

(*t*) *Re Middleton* (1888), 14 P. D. 23.

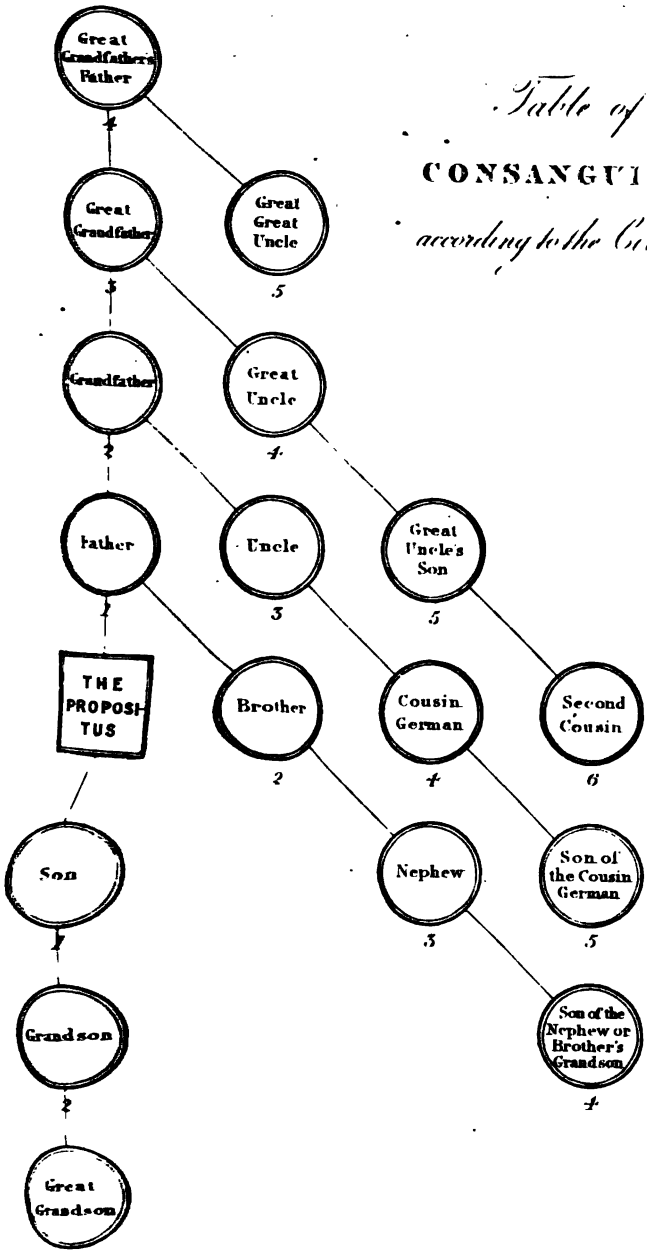
(*u*) *Iredale* v. *Ford* (1859), 1 Swab. & Trist. 305.

(*x*) Prec. Chan. 593; Gilb. *Ten.* 9; *R.* v. *Dr. Hay* (1767), 1 W. Bl. 641.

(*y*) Toller, *Executors*, 87—90, 2nd ed.

(*z*) Godolph. p. 2, ch. 35; Toller, *Executors*, *ubi supra*.

Table of CONSANGUINITY according to the Civilians



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[sisters (*a*), and after them grandfathers and grandmothers; for though all these are in the second degree, yet we give the preference to brothers and sisters (*b*). After all these, come uncles and nephews (*c*), and the females of each class respectively; and lastly, cousins. 4. The half blood is admitted to the administration as well as the whole, for they are of the kindred of the intestate: and though they were formerly excluded from the inheritance of *land*, yet this was upon feudal reasons only, which have nothing to do with personal estate. Therefore the brother of the half blood shall exclude the uncle of the whole blood (*d*); and the court might at its discretion grant the administration either to the sister of the half blood or to the brother of the whole blood (*e*).] 5. Again, no preference obtains between relatives *ex parte paternâ* and those *ex parte maternâ*, but administration may be committed to either (*f*). As, however, letters of administration are now granted in respect of real estate, as well as, or even in default of, personal estate (*g*), the Land Transfer Act, 1897 (*h*), provides that on such grant regard shall be had to the rights of persons interested in the real estate of the deceased; and that his heir at law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin.

[If none of the kindred will take out administration, a creditor may do it (*i*). And lastly, the court may, in default of all these, commit administration to such discreet

(*a*) Prec. Chancery, 527; *Blackborough* v. *Davis* (1701), 1 P. Wms. 41.

(*b*) *Evelyn* v. *Evelyn* (1753), 1 Amb. 191; 3 Atk. 762; Toller, *Executors*, 91.

(*c*) *Blackborough* v. *Davis*, *ubi supra*.

(*d*) 1 Ventr. 424.

(*e*) Aleyn, 36; Styl. 74.

(*f*) *Moor* v. *Barham* (1723), 1 P. Wms. 53.

(*g*) 60 & 61 Vict. c. 65, s. 1 (3); *Re Barnett*, [1898] P. 145.

(*h*) Sect. 2 (4).

(*i*) *Gidley* v. *Williams* (1701), 1 Salk. 38; *Re Bradshaw* (1887), 13 P. D. 18.

[person as it approves of (*k*) ; or may grant him letters *ad colligenda bona defuncti*, which makes him neither executor nor administrator,—his only business (in that case) being to keep the goods in his custody (*l*), but not to dispose thereof, except in payment of debts and preservation of the estate (*m*).

And here let us observe, that if a bastard (who has no kindred, being *nullius filius*), or anyone else that has no kindred, dies intestate, and without wife or child, it was at one time held, that the ordinary might seize his goods and dispose of them *in pios usus* (*n*) ; but latterly the usual course, in such cases, was for anyone who could establish a moral claim, to procure letters patent, or other authority from the Crown, and the court would then grant administration to the person therein named (*o*)]. But the present practice is, to grant administration to the Treasury Solicitor, or to his nominee, on behalf of the Crown (*p*) ; and any claim to the goods (whether it be a legal claim or such moral claim as aforesaid) must be established against him within the period of twenty years (*q*). And the like practice is applicable, when the Prince of Wales in right of his Duchy of Cornwall (*r*), or the King in right of his Duchy of Lancaster (*s*), becomes entitled to the goods of bastards.

In what has been stated on this subject, the administration granted is supposed to be a *general* one ; as is always the case where the deceased dies wholly intestate, without making any will at all. [But it may happen, that he has made a will without naming any executor, or has named an incapable person ; or that the executor may

(*k*) *Davis* v. *Chanter* (1844), 14 Sim. 212; *Re Webb* (1888), 13 P. D. 71.

(*l*) Went. ch. 14.

(*m*) 2 Inst. 398; *Re Bolton*, [1899] P. 186.

(*n*) *Manning* v. *Napp* (1693), 1 Salk. 37.

(*o*) *Jones* v. *Goodchild* (1729), 3 P. Wms. 33.

(*p*) *Re Hartley*, [1899] P. 40.

(*q*) 47 & 48 Vict. (1884) c. 71, s. 2.

(*r*) *Re Griffith* (1884), 9 P. D. 63.

(*s*) *Re Arard* (1886), 11 P. D. 75.

[refuse to accept the office, or may himself die intestate before he has administered. In any of which cases, the court will grant administration *cum testamento annexo*, to some other person; in the choice of whom, it prefers the residuary legatee, if any such be nominated in the will, to the next of kin (*t*). And we are informed by Glanville, that this species of administration was in use so early as the reign of Henry the Second (*u*). Again, if there be a sole executor who is under the age of twenty-one, a temporary administration, *cum testamento annexo et durante minore ætate*, may be granted to the guardian of such infant executor, or to such other person as the court shall think fit (*x*).] For (by the Administration of Estates Act, 1798) (*a*) probate must not be granted to the infant executor himself, till he attains his majority; though, if there be several executors named, and any of them be of full age, these latter may act without the co-operation of those under age (*b*). [So also a temporary administration may be granted *durante absentiâ*, as when an executor is out of the realm; or *pendente lite*, as where a suit is commenced touching the validity of the will (*c*).

The title by administration never devolves from one person to another, by representative right, in which respect it differs from the title by will. For the interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of A.'s executor is, to all intents and purposes, the executor and representative of A. himself (*d*). And however long may be the series of executors, the ultimate one is still the representative of A. And even

(*t*) 1 Sid. 281; 1 Roll. Ab. 907.
(*u*) L. 7, ch. 6.
(*x*) *Veret* v. *Duprez* (1868), L. R. 6 Eq. 329; *Monsell* v. *Armstrong* (1872), *ib.* 14 Eq. 423.
(*a*) 38 Geo. 3, c. 87, s. 6.
(*b*) Wms. *Exors.*, p. 185, 9th ed.
(*c*) 20 & 21 Vict. (1857) c. 77, ss. 70—78; 21 & 22 Vict. (1858) c. 95, ss. 18, 20.
(*d*) 25 Edw. 3 (1352), st. 5, c. 5; 1 Leon. 275; 20 & 21 Vict. c. 77, s. 79; 21 & 22 Vict. c. 95, s. 16.

[where there are two executors, and one only of them proves (power being reserved to the other), and the proving executor dies, and the other (after due citation) does not appear, the executor of the proving executor continues the chain of the executorship (*e*). But the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. (*f*). For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence. But the administrator of A. is merely the officer of the court, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the court, to appoint another. Also, with regard to the administrator of A.'s executor, he has clearly no privity with or relation to A., being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the court to commit administration afresh, of such *of the goods* of the deceased as have *not* been administered by the former executor or administrator. And such an administrator *de bonis non* may, as well as an original administrator, have but a *limited* or *special* administration committed to his care, *e.g.*, an administration limited to a term of years, or the like (*g*).] And under the Land Transfer Act, 1897 (*h*), as previously noted, there may be a grant of administration in respect of the *real* estate only of the intestate, for the purposes of the devolution of such real estate under that Act into the personal representative.

Every person to whom administration is granted must,

(*e*) *In the Goods of Reid*, [1896] P. 129.

(*f*) Bro. Ab. *Administrator*, 7.

(*g*) 1 Roll. Abr. 908; Godolph. p. 2, ch. 30; Salk. 36; *Re Lorcday*, [1900] P. 154.

(*h*) 60 & 61 Vict. c. 65, s. 1 (3).

in addition to the affidavit of estate and oath, give a bond (and, if so required, with one or more sureties) conditioned for duly collecting and administering the estate; and if the condition of the bond be broken, the bond is assigned by the court to some person to be chosen for the purpose, who sues thereon in his own name, and recovers, as trustee for the parties interested. the full amount recoverable thereon (*i*).

IV. Our last general head of inquiry involves the consideration of some of the chief points relative to the office of an executor or an administrator. And we will, in the first place, refer to the well-known principle applicable without distinction to both executors and administrators, namely, that, in all matters in which the personal estate is concerned, they *represent* the person of the testator or intestate, as the heir (prior to the Land Transfer Act, 1897) used to do that of his ancestor (*k*); and they, together with the heir of a deceased party, were formerly described as his *real and personal representatives*. So that the executor or administrator has the same property in the chattels of the deceased (including his chattels *real*), as the deceased himself had when living; and, in general, succeeds to his rights of action, and is subject (so far as the *assets* in his hands will extend) to his liabilities (*l*). And this title of the executor will override even the title of a specific legatee of the chattel, *e.g.*, in the case of a specific legacy of stock (*m*); but it is to be particularly noted, that upon contracts made by himself (although in his representative capacity) the executor is personally liable (*n*), with, in general, a right to recoup

(*i*) 20 & 21 Vict. (1857) c. 77, ss. 81—83; 21 & 22 Vict. (1858) c. 95, s. 15; *Saudrey* v. *Mitchell* (1863), 3 B. & S. 405; *In the Goods of Young* (1866), L. R. 1 P. & D. 186.

(*k*) Co. Litt. 209.

(*l*) 4 Edw. 3 (1330), c. 7; 3 & 4 Will. 4 (1833), c. 42.

(*m*) 33 & 34 Vict. (1870) c. 71, s. 23.

(*n*) *Ashby* v. *Ashby* (1827), 7 B. & C. 444; *Prior* v. *Hembrow* (1841), 8 M. & W. 873; *Evans* v. *Evans* (1887), 34 Ch. D. 597; *Hobbs* v. *Wayet* (1887), 36 Ch. D. 256.

himself out of the estate. It must, moreover, be remembered, that by the Land Transfer Act, 1897 (*o*), Part I., ss. 1—5, as regards deaths after the 1st January, 1898, the beneficial real estates of a testator or intestate and which were devisable by him now vest in his executor or administrator (sect. 1); and may be disposed of by the executor or administrator exactly as if they were chattels real (sect. 2), but not by one alone of several executors; that the executor or administrator may *assent* to any devise contained in the will, and may convey the real estate to the heir or devisee (according as either is entitled to it) (sect. 3); and that the executor or administrator may also *appropriate* any real estate to anyone entitled to a legacy, or to a share of the residuary estate, in or towards satisfaction of such legacy or residuary share (sect. 4). But these provisions do not alter (save as before expressed) the beneficial interests, or the mode of administration, or (under sect. 5) any liability to the death duties.

[The duties incumbent upon executors and administrators respectively are, moreover, very much the same; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor; and, secondly, that an executor may do many acts before he proves the will (*p*), being acts proper for an executor to do (*q*), but an administrator may do nothing till letters of administration are issued (*r*). For the former derives his power from the will and not from the probate, while the latter owes his power entirely to the appointment of the court (*s*). But once the letters of administration are, in fact, granted, they also will relate back to the death, so far as acts done

(*o*) 60 & 61 Vict. c. 65.

(*p*) Wentw. ch. 3; *Whitehead* v. *Taylor* (1839), 10 A. & E. 210.

(*q*) *Re Moore* (1888), 13 P. D. 36.

(*r*) *Lucy* v. *Walrond* (1837), 3 Bing. N. C. 841.

(*s*) Comyn, 151.

[for the *benefit* of the estate are concerned (*t*). If any person takes upon him to act in the affairs of the deceased, without any just authority,—as by intermeddling with his goods,—he is called in law an executor *de son tort* ; and is liable to all the trouble of an executorship, without any of its indemnities or advantages (*u*). But merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse, will not amount to such an intermeddling as will charge a man as executor of his own wrong (*x*). Furthermore, an executor *de son tort* cannot himself bring an action in right of the deceased ; but actions may be brought against him (*y*), and he is chargeable with the debts of the deceased, so far as assets come to his hands (*z*), though, as against creditors in general, he is allowed all payments made to any other creditor in the same or a superior degree, himself only excepted (*a*). And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages (*b*) ; unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt (*c*).

We shall now proceed to enumerate the specific powers and duties of executors, premising only that what is here stated as to the executor, applies in general to an administrator also. And these powers and duties are as follows :—

1. He must *bury* the deceased in a manner suitable to

(*t*) *Morgan* v. *Thomas* (1853), 8 Exch. 302.

(*u*) 43 Eliz. (1601) c. 8 ; 5 Rep. 33 ; *Meyrick* v. *Anderson* (1850), 14 Q. B. 726 ; *Sykes* v. *Sykes* (1870), L. R. 5 C. P. 113 ; *In re Lovett* (1876), 3 Ch. D. 198 ; *Attorney-General* v. *New York Breweries*, [1898] 1 Q. B. 205.

(*x*) Dyer, 166 ; *Serle* v. *Waterworth* (1838), 4 M. & W. 9.

(*y*) Bro. Ab. *Administrator*, 8 ; *Rowsell* v. *Morris* (1873), L. R. 17 Eq. 20.

(*z*) Dyer, 166 ; *Job* v. *Job* (1877), 6 Ch. D. 562 ; *Re Mary Mellor* (1883), 8 P. D. 108.

(*a*) 1 Chan. Cas. 33 ; 5 Rep. 20 ; Moor. 527 ; *Thompson* v. *Harding* (1853), 2 El. & Bl. 630.

(*b*) 12 Mod. 441.

(*c*) Wentw. ch. 14.

[the estate which he leaves behind him; the necessary funeral expenses being allowed before all other debts or charges (*d*). But if he be extravagant, or misapply the assets, in this or in any other particular, such a misapplication is a *devastavit*, that is to say, a devastation or waste of the substance of the deceased; and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased (*e*).

2. He must, in the next place, *prove the will* of the deceased, or (as it is otherwise expressed) take out *probate*; and in default of any will, the person entitled to be administrator must also, at this period, take out *letters of administration*.] In order to obtain probate of the will or letters of administration, he is required to pay a certain stamp duty on the amount of the personal estate, a duty formerly called probate duty, and which used to be impressed on the probate or letters of administration. But latterly, by the Customs and Inland Revenue Act, 1881, ss. 27—30, it was paid on the affidavit required to be sworn to obtain the grant, and the grant itself carried on it merely a certificate of the due payment of the duty. And now, under the Finance Act, 1894 (57 & 58 Vict. c. 30), the duty payable is called estate duty, in the case of all persons dying after the 2nd day of August, 1894, the old exemption of estates under 100*l.* being continued, and estates under 300*l.* paying a fixed duty of 30*s.*, and estates under 500*l.* paying a fixed duty of 50*s.* And when the estate duty is paid, no affidavit duty is payable, nor the account duty which was formerly payable under the Customs and Inland Revenue Acts, 1881 and 1889.

3. [The executor must also make an *inventory* of all the goods and chattels; or, in other words, of all the personal

(*d*) *Bisset* v. *Antrobus* (1831), 4 Sim. 512; *Corner* v. *Shew* (1838), 3 M. & W. 356.

(*e*) *Shelly's Case* (1694), 1 Salk. 296; Godolph. pt. 2, ch. 26, s. 2; *Camden* v. *Fletcher* (1838), 4 M. & W. 378.

[estate, including the chattels real, whether in possession or in action, of the deceased. And, since the Land Transfer Act, 1897, even the real estate must be included, though the duty thereon will not necessarily be paid by the executor. And this inventory he is to deliver into the court, upon oath, if and when thereunto lawfully required (*f*).

4. He is to *collect* all the goods and chattels so inventoried; and, to that end, is to bring actions, if necessary, against all persons who withhold them (*g*).] And inasmuch as all the personal estate of the deceased, whether in possession or in action, is *assets* in the hands of the personal representative, and liable as such to pay the creditors of the deceased, the executor is allowed to sell so much of the personal estate as does not already consist of money (and under the Land Transfer Act, 1897, even real estate) in order to answer the demands that may be made upon him. On this subject we may remark, that if there be two or more executors who have proved the will, a sale, receipt, or release by one of them will be good against all the rest (*h*), save that (by the specific rules of certain corporations, *e.g.*, the Bank of England) the concurrence of all the executors may be sometimes required to the transfer of the stock standing in the name of the deceased (*i*). But the concurrence of all the personal representatives is required in a sale or transfer of real estate which has vested in them by virtue of the Land Transfer Act, 1897, unless the sanction of the Court has been obtained. The distinction can hardly arise in the case of an administrator; for he (as we have seen) is in general a single administrator (*k*).

5. [He must *pay* the *debts* of the deceased; and in pay-

(*f*) 21 Hen. 8 (1529), c. 5; *Griffiths* v. *Antony* (1836), 5 Ad. & El. 623.

(*g*) *Webb* v. *Adkins* (1854), 14 C. B. 401; *Farley* v. *Briant* (1839), 3 A. & E. 839.

(*h*) Dyer, 23.

(*i*) 33 & 34 Vict. (1870) c. 71, s. 23.

(*k*) *Hudson* v. *Hudson* (1737), 1 Atk. 460; Wms. *Exors.*, p. 364, 9th ed.

[ment of debts must observe the rules of priority, according to the several degrees which the law has established in this matter; but he may in his discretion pay a debt which is barred by the Statutes of Limitation (*l*). And, first, he must pay all funeral charges, and the expense of proving the will, and the like; secondly, debts due to the Crown, on record or other specialty (*m*); thirdly, such debts as are, by particular statutes, to be preferred to all others, *e.g.*, income tax, poor-rates, and the like (*n*); fourthly, debts of record, such as debts due on duly registered judgments (*o*) and recognizances (*p*); and amongst debts of this degree are to be reckoned also decrees in equity and orders in bankruptcy (*q*); fifthly, all other debts *pari passu*—whether they are on simple contract (that is, on contract by word of mouth or by writing unsealed), or whether they arise or are secured by any bond, deed, or other instrument under seal, or otherwise made or constituted a specialty debt (*r*). And although, under the Real Estate Charges Acts (*s*), mortgage debts are now a primary charge on the real estate comprised in the mortgage, that is no exemption to the executor from the duty of seeing that these debts are paid, or at all events provided for (*t*).

Among debts of equal degree, the executor, if a creditor of the testator (but not now an administrator who is a creditor) is allowed to pay himself first, by retaining so much of the legal assets in his hands as his debt amounts to (*u*), which right is called his right of *retainer*;

(*l*) *In re Greaves, Bray* v. *Tofield* (1881), 18 Ch. D. 551.

(*m*) 1 And. 129.

(*n*) 17 Geo. 2, c. 38; 38 & 39 Vict. c. 60, s. 7.

(*o*) 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112.

(*p*) 4 Rep. 60; Cro. Car. 363.

(*q*) *Shafto* v. *Powell* (1694), 3 Lev. 355; *Morrice* v. *The Bank of England* (1736), 3 Swanst. 573.

(*r*) 32 & 33 Vict. (1869) c. 46; *Shirreff* v. *Hastings* (1877), 6 Ch. D. 610.

(*s*) *Vide supra*, vol. I. p. 177.

(*t*) *Bowles* v. *Hyatt* (1888), 38 Ch. D. 609.

(*u*) *Glaholm* v. *Rowntree* (1837), 6 A. & E. 710; *Campbell* v. *Campbell* (1880), 16 Ch. D. 198; *Norton* v. *Compton* (1885), 30 Ch. D. 15.

[and the executor is in that particular different from the heir, who is not entitled to retain his debt (*x*). But an executor of his own wrong is not allowed to retain, for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and besides, would be permitting them to take advantage of their own wrong, which is contrary to the policy of the law (*y*).] Also, among several creditors of equal degree, he shall be first paid who shall first obtain judgment against the executor for his debt; for the executor or administrator cannot resist the action on the ground that nothing will be left for the other creditors. But he may resist it, on the ground that there is not enough to pay some creditor of higher degree (if there should be any such).] Which latter defence he is *bound* to make, if he have notice that a higher debt is outstanding (*z*); for otherwise, on a deficiency of assets, he must answer for it out of his own estate. And of all debts of record, he has notice by construction of law (*a*).

If an executor, after exhausting (in a due course of administration) the whole assets which have come to his hands, be afterwards sued by a creditor remaining unpaid, he is entitled to defend himself by proving that he has fully administered the assets; and this is called the defence of *plene administravit* (*b*). Upon which plea, the creditor is only entitled to judgment for payment of his debt and costs out of any future assets that shall come to the defendant's hands, that is to say, to judgment out of assets *quando acciderint*. But executors (including administrators) have now been protected generally in their administration of estates; for under the Law of Property Amendment Act, 1859 (*c*), in the case of leases subject to

(*x*) *Davidson* v. *Illidge* (1883), 24 Ch. D. 654; (1884), 27 Ch. D. 478.

(*y*) 5 Rep. 30.

(*z*) Dy. 32; 2 Leon. 60; *Sawyer* v. *Mercer* (1787), 1 T. R. 690.

(*a*) 2 Bl. Com. p. 511.

(*b*) *Palmer* v. *Waller* (1836), 1 M. & W. 689; *Dawson* v. *Gregory* (1845), 7 Q. B. 757.

(*c*) 22 & 23 Vict. c. 35.

onerous rents and covenants, they may obtain protection against all liability for such rents on assigning the lease to a purchaser, and following in other respects the course pointed out by the Act (ss. 27, 28) ; and, under the same Act (s. 29), on giving the prescribed notices to creditors and others, they are enabled to distribute the assets among the parties entitled. Moreover, under the same statute (s. 30), or now under Ord. LV. rr. 3—10 of the Rules of the Supreme Court, 1883, they may obtain the advice or direction of the Court respecting their administration of the estate ; and (under the last-mentioned order), a partial or even a complete administration of the estate, may be obtained on originating summons.

6. [When the debts are all discharged, the *legatees* claim, and are entitled, to be next paid ; and they are to be paid by the executor so far as the assets will extend, the legacy duty (where any) being first paid thereon (*d*). But the executor may not, if a legatee, give himself any such preference as in the case of debts (*e*). And upon the subject of legacies, it will be convenient to consider here some particular rules of law regarding them.

A legacy is a bequest by will of goods or chattels, such bequest being, in general, subject (as above indicated) to legacy duty ; but in case the chattel is a leasehold or chattel real, the duty is succession duty, and not legacy duty (*f*). Every bequest of goods or chattels transfers to the legatee, on the death of the testator, an inchoate property in that which is given ; but his interest therein is not perfect without the assent of the executor. For if I am entitled to receive a *pecuniary* legacy of 100*l*., or a *specific* one of a piece of plate, I cannot in either case take the legacy without the consent of the executor (*g*), in whom all the chattels are in the first instance vested ; and it is his business to see, whether there is a sufficient fund to

(*d*) 44 Vict. (1881) c. 12, ss. 36—43.

(*e*) 2 Vern. 434 ; 2 P. Wms. 25.

(*f*) 16 & 17 Vict. (1853) c. 51, s. 19.

(*g*) Co. Litt. 111 ; *Richards* v. *Browne* (1837), 3 Bing. N. C. 493.

[pay all the debts of the testator (*h*), or, as Bracton expresses the sense of our antient law, "*de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis et ultimo quæ sunt voluntatis*" (*i*). Also, in case of a deficiency of assets, all the *general pecuniary* legacies must *abate* proportionably; nay, even if the legatees have been paid, they must refund a rateable part, in case debts come in afterwards, which more than exhaust the residue after legacies paid (*k*), which law is also as old as Bracton and Fleta, who tell us, "*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio*" (*l*). However, a *specific* legacy of a piece of plate, or of a horse, or the like, is not to abate at all, unless there be not sufficient without such abatement to pay the debts of the deceased (*m*);] but, on the other hand, a specific legacy is liable to *ademption*, which arises where the thing so bequeathed is afterwards destroyed or disposed of in some other manner by the testator himself before his death. And where a specific legacy is thus adeemed, the legatee has no longer any claim under the will (*n*).

Also, if the legatee die before the testator, the legacy is in general lost or *lapses*, and shall sink into the residue; but by a provision in the Wills Act, 1837, s. 33, referred to in the chapter on Devises, an exception to this rule has been introduced, in cases where the bequest is to a child, or other issue of the testator, for any estate or interest not determinable at or before the death of the legatee, and the legatee leaves issue, who survive the testator, and no intention to the contrary appears on the face of the will (*o*).

(*h*) *Smith* v. *Day* (1837), 2 M. & W. 684.

(*i*) L. 2, ch. 26.

(*k*) *Newman* v. *Barton* (1690), 2 Vern. 205.

(*l*) Bract. l. 2, ch. 26; Fleta, l. 2, ch. 57, s. 11.

(*m*) 2 Vern. 111.

(*n*) *In re Gibson, Matthews* v. *Foulsham* (1866), L. R. 2 Eq. 669.

(*o*) *Vide supra*, vol. I. p. 368.

[As regards a *contingent* legacy, if a legacy be left to anyone, when he shall attain, or if he attain, the age of twenty-one, and he die before that time, it is a lapsed legacy, even though he survive the testator (*p*); but a legacy to one "to be paid" when he attains the age of twenty-one years, is a *vested* legacy,—an interest, that is to say, which, as to title, commences *in præsenti*, although it be *solvendum in futuro*. And if the legatee in such a case die under age, his representatives shall in general receive it out of the testator's personal estate (*q*); but if the legacy is charged upon real estate, it shall lapse for the benefit of the heir, unless there be something further in the will, sufficient to show a contrary intention (*r*). And note, that if a legacy, due immediately, be charged on land, interest (at the rate of 4*l*. per cent. per annum) will be payable thereon from the testator's death (*s*). But if not so charged, it will only carry interest from the end of the year after the death of the testator; for that is the time generally allowed by law for the payment of legacies (*t*). On the other hand, a *specific* legacy of an income-bearing fund (say, of stock) carries with it the dividends or income as from the death (*u*).]

There is another species of contingent legacy; as where personal estate is bequeathed to A., and upon his dying *without issue*, then over to B. This expression was formerly considered as importing an indefinite failure of issue; and the bequest over, as being too remote and tending to a perpetuity, was consequently held to be void (*x*). But a contrary rule was established by the Wills Act, 1837, s. 29, as more fully explained in the chapter on Devises (*y*);

(*p*) Dyer, 59; 1 Eq. Cas. Ab. 295; 2 Bl. Com. 513.

(*q*) 1 Eq. Cas. Ab. 295.

(*r*) *Duke of Chandos* v. *Talbot* (1731), 2 P. Wms. 601; Co. Litt. by Butl. 237 a, note (1).

(*s*) 2 Bl. Com. p. 513.

(*t*) *Maxwell* v. *Wettenhall* (1722), 2 P. Wms. 26, 27.

(*u*) *Kirby* v. *Potter* (1799), 4 Ves. 751; *Barrington* v. *Tristram* (1801), 6 Ves. 349.

(*x*) Fearne, Cont. Rem. 485 (9th edit.).

(*y*) *Vide supra*, vol. I. p. 373.

for by that rule, this expression is now to be construed (unless a contrary intention appear on the face of the will) as importing a failure of issue in the lifetime or at the death of A. And such a bequest over as that just mentioned will, consequently, now be good.

7. [When all the debts and legacies are discharged and paid, and the duties on the legacies are also paid, and the residuary accounts have been duly passed by the executors, then the surplus, or residue (if any), must be paid to the residuary legatee, appointed by the will; or if there be none, then to the next of kin of the deceased. For although it was long a settled notion, that such surplus devolved to the executor's own use, by virtue of his executorship (*z*), that doctrine was always understood as subject to this restriction, that wherever there was sufficient, on the face of the will, to show that the executor was *not* intended to have the residue, it should go to the next of kin (*a*). And it has now been provided generally, by the Executors Act, 1830 (*b*), that unless it shall positively appear by the will that the executor was intended to have the residue, he shall be deemed to be a trustee of it for such persons (if any) as would have been entitled (had the testator died intestate) to claim it as his next of kin; so that now the executor (or administrator) is entitled to such residue or surplus, only in the absence of any next of kin (*c*).

8. The Statute of Distribution (*d*) was passed with reference to the case of an *intestacy*, and to provide for the residue of the estate which remained after payment of the dead man's debts; for here, too, it was formerly much doubted whether the administrator could be compelled to make any distribution of the surplus (*e*). By that Act,

(*z*) Perkins, 525.

(*a*) 11 Geo. 4 & 1 Will. 4 (1830), c. 40.

(*b*) 11 Geo. 4 and 1 Will. 4, c. 40.

(*c*) *Camp* v. *Coe* (1886), 31 Ch. D. 460.

(*d*) 22 & 23 Car. 2 (1670), c. 10.

(*e*) Godolph. pt. 2, ch. 32.

[as explained by the Statute of Frauds, it was provided, that the surplusage of intestates' estates,—except in the case of femes covert, the administration and enjoyment of whose estates belonged, by the principles of the common law, to their husbands,—should, after the expiration of one full year from the death of the intestate, be distributed in the following manner, that is to say:—one-third should go to the widow of the intestate, and the residue in equal proportions to his children, or, if they were dead, to their representatives, that is their lineal descendants; if there were no children or legal representatives of such children subsisting, then a moiety was to go to the widow, and a moiety to the next of kindred in equal degree, and their representatives; and if no widow, the whole was to go to the children; if neither widow nor children, the whole was to be distributed among the *next of kin* in equal degree, and their representatives: but, among collaterals, no representatives (as such) were to be admitted, farther than the children of the intestate's brothers and sisters (*f*). The next of kindred here referred to are to be ascertained by the same rules of consanguinity, as those which indicate who are entitled to letters of administration, of which we have already sufficiently spoken (*g*); and, therefore, according to the Statute of Distribution, the father, or if he were dead, the mother, succeeded to all the personal effects of their children who died intestate and without wife or issue, to the exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by the stat. 1 Jac. II. (1685) c. 17, if a man die intestate and without issue, leaving no father, but leaving a mother and brothers or sisters, the mother, and each of the brothers and sisters, or their representatives, shall divide his effects in equal portions; subject of course, to the rights of his widow, if any.

(*f*) Raym. 496; *Pett's Case* (1700), 1 P. Wms. 25.

(*g*) *Vide supra*, p. 240.

[By another provision of the Statute of Distribution, it is enacted that no children of the intestate (except his heir-at-law) on whom he may have settled in his lifetime any estate in lands or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but that if the estate so given them by way of advancement shall not be equivalent to the other shares, the children so advanced shall have so much as will make them equal,—a just and equitable provision said to be derived from the *collatio bonorum* of the Roman law, which it certainly resembles in some points, though it differs widely from it in others (*h*). And it may not be amiss to here observe, that this doctrine of advancement, with regard to goods and chattels, was part of the antient custom of London (*i*), of the province of York, and of the kingdom of Scotland (*k*).

It must be particularly observed also, with regard to the Statute of Distribution, that personal estate is sometimes divided *per capita*, and sometimes *per stirpes*; that is to say, personal estate is divided *per capita*,—to every man an equal share,—when all the next of kin claim in their own rights, as in equal degree of kindred, and not *jure representationis*, as in the right of another person. Thus, if the next of kin be the intestate's three brothers, A., B., and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each. But if one of these brothers, A., had been dead, leaving three children, and another, B., leaving two; then the distribution must have been *per stirpes*, viz., one-third to A.'s three children, another third to B.'s two children, and the remaining third to C., the surviving brother. But if C., in the case supposed, had also been dead, without issue, then A.'s and B.'s children, being all in equal degree to the

(*h*) Dig. 37, 6, 1.
(*i*) *Kemps* v. *Kelsey* (1722), Prec. Ch. 596.
(*k*) Ersk. Inst. b. 3, tr. 9, ss. 24.

[intestate, would have taken in their own rights *per capita* ; viz., being five in all, each of them one-fifth part (*l*).] However, as regards the *descendants* of the intestate, the distribution is in all cases *per stirpes*, and not *per capita* ; *e.g.*, if A. dies intestate leaving three grandchildren by his son B., and one grandchild by his daughter C., the one moiety of the estate goes to the three children of B., and the other moiety to the one child of C. (*m*).

By the Statute of Distribution, the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects, were expressly excepted and reserved ; so that, though in those places the restraint of *devising* had been long removed, their antient customs, with respect to the estates of *intestates*, still remained in full force (*n*). Any special customs, however, concerning the distribution of estates in these or other places have now been wholly abolished, save only with respect to the estates of those who may have died on or before the 31st December, 1856. For, by the 19 & 20 Vict. (1856) c. 94, the distribution of the personal estate of all persons dying intestate on or after the 1st January, 1857, is directed to take place as if the rules for the distribution of the personal estates of intestates, generally prevalent in the province of Canterbury, prevailed throughout the whole of England and Wales ; any law, custom, or statute to the contrary notwithstanding.

And here it is necessary to mention that, by the Intestates' Estates Act, 1890 (*o*), in the case of a husband who dies intestate after the 1st September, 1890, *and who leaves no issue*, the whole estate (real and personal) of the deceased now passes to his widow, if it be under a total

(*l*) Prec. Chan. 54.

(*m*) *In re Natt, Walker* v. *Gammage* (1888), 37 Ch. D. 517, following *Lockyer* v. *Yarde* (1741), Barn. Ch. 444.

(*n*) *Mattheirs* v. *Newby* (1682), 1 Vern. 133.

(*o*) 53 & 54 Vict. c. 29.

value of 500*l.*; and where such estate exceeds that value, she now takes 500*l.* out of it, in priority to all persons entitled under the Statute of Distribution (*p*). And then (and subject to these special provisions in the widow's favour), the residue of the personal estate is distributable according to the former law, that is to say, one-half to the widow and the remaining one-half among the next of kin.

(*p*) *Duret* v. *Charrière*, [1896] 1 Ch. 912.

CHAPTER VIII.

OF SOME MIXED OR IRREGULAR SUBJECTS OF PROPERTY.

WE have thus taken a general survey of the law of property, under its two great heads of "real" and "personal." These, as we have seen, are strongly distinguished from each other ; not only as regards the natural qualities of immobility on the one hand, and mobility on the other, but also as regards the legal incidents to which each class is respectively liable. There are, however, in the law of property, some few cases of a mixed character, with the consideration of which we will close the second book of these Commentaries ; that is to say, there are things real which are attended with some of the incidents of things personal, and there are things personal which are attended with some of the incidents of things real.

Among things real which have some of the legal incidents of things personal, we shall consider (1) *emblements*, (2) *fixtures*, and (3) *shares*.

1. *Emblements* are, as we have previously said (*a*), the growing crops annually produced by the labour of the cultivator. All vegetable growths, until they are actually severed from the soil, are, of course, in legal contemplation, part of the realty, not less than the soil itself ; but, upon severance, they change their character, and are converted into personalty (*b*). They are consequently governed, when in the first predicament, by all those rules, as to estate and title, which are incident to things real ; but when in the second predicament, they are governed by the

(*a*) *Ante*, bk. ii., pt. i., ch. iv. (*b*) *Re Ainslie* (1885), 30 Ch. D. 485.

rules which attach to things personal. Thus trees, while still implanted in the ground, are parcel of the freehold, and as such will pass, on the death of the owner of the inheritance, to the heir or devisee; but when felled or blown down, they become part of his personal estate, and belong on his decease, to his personal representatives on behalf of his next of kin or legatees. To this general doctrine, however, emblements or *fructus industriales* are an exception; for these, even while still in union with the soil, follow, in several particulars, the nature of personal, as distinguished from real estate.

For, in the first place, as we have seen (*c*), emblements may lawfully be severed from the soil, and removed by the tenant whose industry has produced them, or his representatives, on the termination of his tenancy, provided that such termination was caused by an event which he cannot be reasonably held to have foreseen. It is not necessary to dwell any further on this point, which has been fully dealt with in earlier chapters.

In the second place, upon the death of a terre-tenant seised in fee, the emblements growing on his land at the time of his decease will not pass to the heir, but to the personal representatives of the deceased terre-tenant; for which the reason seems to be, that they were sown with the intention of being reaped by himself, and of thus being ultimately converted into or forming part of his personal estate (*d*). And now that, in cases of inheritance, descent is traced, not from the person last seised, but from the last purchaser, the reason for the rule would appear to be still stronger than before. The law, however, maketh a distinction between an heir and a devisee. For the devise to a man of a particular piece of land will, unlike a descent, suffice to carry with it the emblements growing thereon at the testator's decease (*e*).

Thirdly, the emblements of a terre-tenant are subject,

(*c*) *Ante*, bk. ii., pt. i., ch. iv.
(*d*) Wms. *Exors.*, I. 623.
(*e*) *Cooper* v. *Woolfitt* (1857), 2 H. & N. 122.

like his movables, to be distrained upon for any arrears of rent that he may owe his landlord. Formerly, indeed, this was otherwise ; for, at common law, the emblements of a tenant were considered, for this purpose, as part of the freehold, and as such, not distrainable. But by the Distress for Rent Act, 1737 (*f*), landlords were empowered to take and seize, as a distress for arrears of rent, all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, which should be growing upon any part of the demised premises, and the same to cut and lay up, preparatory to a sale, either upon the premises, or, if there be no convenient storing-place thereon, upon other land.

Finally, in case of a judgment against the terre-tenant, his emblements are liable to be taken upon a writ of *fieri facias* ; and this, not as the result of special statute, but simply because of the similarity which exists, in other particulars, between the law of personal property and the law of emblements (*g*).

2. *Fixtures* may be defined as things of an accessory character, annexed to houses or lands ; and they include not only such matters as grates in a house, or steam-engines in a colliery (which follow in some respects the law of personal chattels), but such things also as windows and palings, which are for every purpose parcel of the realty. To be a fixture, however, the thing must not constitute a part of the principal subject-matter itself, *e.g.*, the walls or floors of a house, being an intrinsic part of the house, are never described as fixtures ; and yet the fixture must be in some union or connection with the principal subject-matter, and not merely brought into contact with it, as in the case of a picture suspended on hooks against a wall, or a wooden barn resting, by its weight alone, upon a brick foundation (*h*).

(*f*) S. 8.

(*g*) *Evans* v. *Roberts* (1826), 5 B. & C., at p. 832 ; *Re Woodham* (1887), 20 Q. B. D. 40.

(*h*) *Elwes* v. *Maw* (1802), 3 East, 55 ; but see *Norton* v. *Dashwood*, [1896] 2 Ch. 497.

By an antient rule of the common law (the result, perhaps, of that paramount regard which in former times was paid to land as compared with personal property), every fixture, or thing annexed to the realty, became, immediately on the annexation, part of the realty itself,—the maxim being, *quicquid plantatur solo, solo cedit* (*i*). The application of this maxim implied that, in general, the fixture was thereafter governed by the same law which applied to the land with which it was incorporated, and that it ceased altogether to follow the law applicable to personal estate. There are, however, numerous cases in which the contrary is now true, and in which the fixture now retains, after its annexation, the quality of a personal chattel, reason and convenience seeming to require that, with regard to them, the old common law rule should be qualified. And, accordingly, we find the law to be :—

First, as between a tenant in fee's heir (or devisee) and his personal representatives, the fixtures will in general follow the land ; even such of them as have been put up merely for ornament or domestic use devolving to the real representative, inasmuch as they are not capable of removal without material damage to the freehold, and are essential to its enjoyment, if not in its natural, at least in its acquired or factitious, character (*k*). And the same rule seems to apply also *as between these parties*, to such fixtures as have been placed or erected for purposes connected with trade (*l*).

Secondly, as between the tenant of a particular estate and the person entitled in remainder, though in general the former is bound to commit no *waste*, but to keep the inheritance entire and unimpaired ; yet it would seem that trade fixtures, and also ornamental or domestic fixtures, if put up by himself, may be lawfully removed by him, or

(*i*) *Re Aindie* (1885), 30 Ch. D. 485.

(*k*) *D'Eyncourt* v. *Gregory* (1866), L. R. 3 Eq. 382 ; *Norton* v. *Dashwood*, [1896] 2 Ch. 497.

(*l*) *Fisher* v. *Dixon* (1845), 12 Cl. & F. 312.

by his personal representative, as the case may be, and that either during the continuance of his estate, or on its determination.

Thirdly, as between mortgagors and mortgagees, the old common law rule for a long time asserted its predominance; and even trade fixtures were in general esteemed parcel of the realty, whether expressly mentioned in the mortgage, or not (*m*). And it is difficult to say, that the old rule is not still applicable in this particular, although in the Bills of Sale Acts, 1878 and 1882, requiring registration of a mortgage of personal chattels, fixtures are undoubtedly treated as being (for the purposes of registration) mere personal chattels (*n*).

But where, after the mortgage, the mortgagor leases to another, and the lessee erects trade fixtures on the land demised, his (the lessee's) right to remove these fixtures is not lost by reason of the mortgage; and the mortgagee cannot therefore sell such fixtures as if they were (by force of the old common law rule) comprised in his security (*o*). Also, in general, chattels bought by the mortgagor, and brought upon and affixed to the mortgaged land *subsequently* to the mortgage, will not pass to the mortgagee, if the seller reserve his property therein until the price therefor is paid (*p*); because, in these two particulars, the exigencies of modern business clearly demand a modification of the general law.

Fourthly, as between landlord and tenant, it is held that the latter, though guilty in general of waste if he despoils the freehold, may nevertheless take away during the continuance of his term—though not (unless by permission) after he has quitted the premises (*q*)—such fixtures as he

(*m*) *Climie* v. *Wood* (1868), L. R. 3 Ex. 257; 4 Ex. 328; *Longbottom* v. *Berry* (1869), L. R. 5 Q. B. 123.

(*n*) *Hobson* v. *Gorringe*, [1897] 1 Ch., at p. 189; *Monti* v. *Barnes*, [1901] 1 K. B. 205.

(*o*) *Sanders* v. *Davis* (1885), 15 Q. B. D. 218.

(*p*) *Cumberland Bank* v. *Maryport Iron Co.*, [1892] 1 Ch. 415.

(*q*) *Leader* v. *Homewood* (1858), 5 C. B. (N.S.) 546; *Re Lavies* (1877), 7 Ch. D. 127.

has himself put up, either for the purposes of trade, or for the ornament or furniture of the premises demised (*r*); and of course, the legal representative of the tenant (including his trustee in bankruptcy) has the like right of removal (*s*). But this right does not extend to erections of such a nature, that their removal would be of material detriment to the freehold; for these latter fall under the general rule, and not under the exception, and must consequently be yielded up to the landlord, at the end of the term, as parcel of the inheritance (*t*). Nor did this right extend, at common law, to things annexed to the realty for purposes merely *agricultural*; but by the Landlord and Tenant Act, 1851, s. 3, if a tenant of a farm or lands (with the consent in writing of his landlord), at his own expense, erects any building or machinery, either for agricultural or trade purposes, being under no previous obligation to do so, such erection remains the property of, and is removable by, the tenant, though, in removing it, he is not to injure the premises demised. The landlord may, however, on receiving notice, elect to purchase the fixture, at a value to be ascertained by two referees or their umpire. Also, more recently, by the Agricultural Holdings Act, 1883 (*u*), re-enacting a similar provision contained in the Agricultural Holdings Act, 1875 (*x*), it has been enacted, but only as regards the holdings affected by that Act, that where after the commencement of the Act (the 31st day of December, 1883), a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not (under the Act or otherwise) entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in

(*r*) *Wilde* v. *Waters* (1855), 16 C. B. 637; *Elliott* v. *Bishop* 1855), 11 Exch. 113.

(*s*) *In re Walker* (1884), 13 Q. B. D. 454; *In re Mower* (1884), *ib.* 738.

(*t*) *Buckland* v. *Butterfield* (1820), 2 Brod. & Bing. 54.

(*u*) 46 & 47 Vict. c. 61, s. 34.

(*x*) 38 & 39 Vict. c. 92, s. 53.

that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of, and be removable by, the tenant before, or within a reasonable time after, the termination of the tenancy. But (1) before the removal of the fixture or building, the tenant is to pay all rent, and to satisfy all other his covenants in respect of the holding; (2) in the removal, he is not to do any avoidable damage to the holding; (3) immediately after the removal, he is to make good all the damage occasioned to the holding by the removal; (4) he is not to remove the fixture or building without giving one month's previous notice in writing to the landlord of his intention to remove it; whereupon (5) at any time before the expiration of the notice, the landlord, by counter-notice in writing given by him to the tenant, may elect to purchase the fixture, and thereupon it is to be left by the tenant, and becomes the property of the landlord, he duly paying therefor the price thereof, as agreed between them, or (failing such agreement) as ascertained by valuation.

Fifthly, with regard to the rights of an execution creditor to seize and sell fixtures under a writ of *fieri facias*, the rule appears to be, that, upon a *fieri facias* issued against the tenant for years, who is entitled to remove them, the fixtures may be seized and sold under such writ (*y*); but upon the like writ issued against the tenant of the freehold, they are exempt from the operation of any such process (*z*). But fixtures are not ordinarily subject to a distress for rent (*a*); at least in cases where they cannot be restored, after removal, in the like plight and condition (*b*).

(*y*) *Poole's Case* (1703), 1 Salk. 368.

(*z*) *Winn* v. *Ingilby* (1822). 5 B. & Ald. 625.

(*a*) Co. Litt. 47 b.; *Gorton* v. *Falkner* (1792), 4 T. R. 565.

(*b*) *Darby* v. *Harris* (1841), 1 Q. B. 895; *Hellawell* v. *Eastwood* (1851), 6 Exch. 295.

3. *Shares in public undertakings connected with land.*—As we have previously seen, in the chapter on estates held in co-ownership (*c*), an undivided share in real estate itself, as a rule, follows the nature of the property in which it is held. Upon this principle, shares held in any of the numerous public undertakings, such as mines, canals, and railroads, which are immediately and principally concerned with the acquisition and user of land, ought to be treated as things real. And in fact, when such shares were first introduced, they were so treated. Thus, the shares in the famous New River Company, founded in the reign of James I., have always been regarded as real estate (*d*); and, in the year 1799, the court declared a share in the undertaking known as the "Bath Navigation" also to be of that character (*e*). Moreover, it was on more than one occasion held, that similar interests, even though specially declared by Act of Parliament to be personal estate, were within the operation of the Statutes of Mortmain (*f*). But, in recent years, there has been a decided tendency to reverse this policy. Thus, by sect. 22 of the Companies Act, 1862, the shares in all companies incorporated under that Act are made personal estate; and, in the cases to which these Companies Acts do not apply, it is usual to provide, by the documents of incorporation, that the shares in the undertaking shall be regarded as personalty for all purposes. The Mortmain and Charitable Uses Act, 1891, enacts (sect. 3) that the word "land," in that and the principal Act of 1888, shall not be deemed to include "money secured on land or other personal estate arising from or connected with land." It is probable, therefore, that any shares declared by the authority, direct

(*c*) *Ante*, bk. ii., pt. i., ch. 8.

(*d*) *Darell* v. *The New River Co.* (1849), 3 De G. & S. 397.

(*e*) *Howe* v. *Chapman* (1799), 4 Ves. 544.

(*f*) *Tomlinson* v. *Tomlinson* (1823), 9 Beav. 459; *Ware* v. *Cumberlege* (1855), 20 Beav. 503.

or indirect, of an Act of Parliament, to be personal estate, would now be entirely outside the scope of the Mortmain Acts (*g*).

We now approach the consideration of those things personal which are, for certain purposes, treated by our law as having the character of real estate. And of these the chief examples are: (1) *title deeds*; (2) *heir-looms*, and (3) *animals feræ naturæ*.

(1.) *Title-deeds*, including charters, court-rolls, and other evidences of the title to lands, together with the chests in which they are contained, pass together with the inheritance, and go not to the executor (*h*). And the reason is, because such documents are necessary to the well-being of the inheritance, and so (by the general law) pass with it, and as parcel of the freehold; and their custody is with the legal freeholder, although he should be only entitled to the lands for his life (*i*). But where title-deeds have been deposited by the owner as a security for money lent, they are chattels in the hands of the mortgagee; and his special property in them will pass, on *his* decease, to his personal representative (*k*).

2. [*Heir-looms* are such goods and personal chattels as, by *special custom*, pass upon death to the heir along with the inheritance, and not to the executor of the last proprietor. The termination, *loom*, is of Saxon original, in which language it signifies a limb or member; so that an heir-loom is nothing else but a limb or member of the inheritance. As a general rule, they are such things as cannot be taken away without damaging or dismembering the freehold; but, under the denomination of heir-looms,

(*g*) Long before the passing of this Act, the decisions in *Tomlinson* v. *Tomlinson* and *Ware* v. *Cumberlege* had been overruled by Lord CRANWORTH in the case of *Edwards* v. *Hall* (1855), 6 De G. M. & G. 74.

(*h*) Bro. Ab. tit. *Chattels*, 18; Co. Litt. 6 a; Com. Dig. *Biens*, B.; *Charters*, A.; *Wright* v. *Robotham* (1886), 33 Ch. D. 106.

(*i*) *Allwood* v. *Heywood* (1863), 1 H. & C. 745; *Leathes* v. *Leathes* (1877), 5 Ch. D. 221.

(*k*) Shep. *Touch.* 469.

[even carriages, pictures, utensils, and other household implements, may be included (*l*), provided the custom to include them be strictly proved (*m*). The antient jewels of the Crown are also said to be heir-looms (*n*); and all such descend upon the heir, or other the person entitled to the inheritance for a freehold estate therein, whereas all chattels personal whatsoever (other than those of this peculiar character) vest in the personal representatives of the deceased owner (*o*). Also, it is said, that heir-looms, though mere chattels, cannot be devised away from the inheritance by will; such a devise is void, even when made by the tenant in fee simple. For though the owner might, during his life, have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly vested in the heir, the devise of them (which is subsequent, and not to take effect till after his death) is postponed to the custom, whereby they have already descended (*p*).

Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of honor, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir (*q*). Pews in a church are somewhat of the same nature, which may descend by custom immemorial from the ancestor to the heir (*r*).]

Once more, the term "heir-looms" is applied, in ordinary speech, in a still wider sense, so as to include, for example, pictures, plate, furniture, and the like,

(*l*) Co. Litt. 18 b, 185 b.
(*m*) Co. Litt. 18, 185.
(*n*) *Ibid.* 18 b.
(*o*) *Ibid.* 388.
(*p*) Co. Litt. 185 b.
(*q*) Co. Litt. 18; *Corven's Case*, 12 Rep. 105.
(*r*) *Corven's Case*, *ubi supra.*

directed by will or settlement to follow the limitations, thereby made, of some family mansion or estate. But the word is not then employed in its strict and proper meaning; nor is the disposition itself, beyond a certain point, effectual. For the articles will, in such a case, belong absolutely to the first person who, under the limitations, would take a vested estate of inheritance in them, supposing them to be real estate. And the person so becoming entitled to them may clearly dispose of them by his will; and if he die intestate, they will pass to his personal representative, and not to his heir (*s*).

3. *Animals feræ naturæ* (such as deer in a real authorized park, fishes in a pond, doves in a dove-house, etc.) are ranked as parcel of the freehold, by the *general law* of the realm, because they are necessary to the well-being of the inheritance (*t*). And when they are confined upon a man's estate, but not domesticated, they pass, if he were seised of an estate of inheritance, to his heir or devisee; and if he were possessed for a term of years, they pass to his executor or administrator (*u*). But if domesticated, they become goods and chattels, equally with animals naturally tame; in which latter case, they belong, in every instance, on the death of the owner, to his personal representative.

(*s*) *Gower* v. *Grosvenor* (1740), 5 Madd. 337; Barnard. Ch. Rep. 54; *Lord Scarsdale* v. *Curzon* (1859), 1 J. & H. 40. But, subject to the rule against perpetuities, such a person may be restrained from alienating them till he attains his majority.

(*t*) 2 Bl. Com. 427.

(*u*) Co. Litt. 8 a; *Liford's Case* (1614), 11 Rep. 50; *Morgan* v. *Abergavenny* (1849), 8 C. B. 768.

BOOK III.

OF RIGHTS IN PRIVATE RELATIONS.

CHAPTER I.

OF MASTER AND SERVANT.

We now proceed to consider the rights of persons in their private relations, the principal relations in private life being—

(1) the relation of *master and servant*;
(2) the relation of *husband and wife*;
(3) the relation of *parent and child*; and, incidentally to the latter,
(4) the relation of *guardian and ward*.

First, The relation of MASTER AND SERVANT.—Slavery (it need hardly be said) does not, and cannot (*a*), exist in England, or, in fact, in any of the territories which are within the King's dominions (*b*); but the English law sanctions and upholds the mere obligation of service, the engagement, that is to say, of a man or woman, *sui juris* and free to contract, to enter for pay into the service of another, for such period as may be mutually agreed upon. Even a contract to serve for life is not invalid (*c*). But a contract of personal service will not be specifically

(*a*) *Smith* v. *Brown* (1706), Salk. 666: *Somersett's Case* (1772), 11 St. Tr. 340; Lofft, 1; and see 3 & 4 Edw. 6 (1550), c. 16.

(*b*) 3 & 4 Will. 4 (1833), c. 73, s. 12.

(*c*) *Wallis* v. *Day* (1837), 2 M. & W. 273.

enforced; and it is not competent to the parties to attach thereto any servile incidents, such as unlimited rights of personal control and correction (*d*).

We will first deal with certain classes of servants and the peculiar rules relating to their service.

Menial servants are so called from living *intra mœnia*, within the house or its curtilage, such as a domestic servant, a coachman or groom, a gardener living in a house within his master's grounds (*e*). Although it is usual to engage such servants at a fixed amount of wages by the year, there is generally no express stipulation as to the time that the service is to last. In such cases the hiring is thus understood, that it is *by the year*, but that either party may at any time determine it at pleasure, upon giving a month's notice, for which a month's wages (on the part of the master at least) are considered as an equivalent (*f*). A custom to go at the end of the first month of service on giving notice during or at the end of the first fortnight is good, if proved by sufficient evidence; but it is not so notorious that the court would take notice of it in the absence of such evidence (*g*). A clerk or governess is not a domestic servant; and he or she, if engaged without express agreement as to time, cannot be dismissed (save for misconduct) without a reasonable notice, expiring, or not expiring, at the end of the current year of the service (*h*); for it may be taken (with regard to the time at which the notice must expire) that there is no inflexible rule of law on the subject, but that each case must depend on its own circumstances (*i*).

A domestic servant may be dismissed on the ground of misconduct or wilful disobedience at any time, and without

(*d*) *Davies* v. *Davies* (1887), 36 Ch. D. 359, at p. 393.

(*e*) *Nowlan* v. *Ablett* (1835), 2 C. M. & R. 54.

(*f*) *Nowlan* v. *Ablett*, *ubi supra*; *Gordon* v. *Potter* (1860), 1 F. & F. 644.

(*g*) *Moult* v. *Halliday*, [1898] 1 Q. B. 125.

(*h*) *Todd* v. *Kerrich* (1852), 8 Exch. 151; *Brown* v. *Symons* (1860), 8 C. B. (N.S.) 208.

(*i*) *Fairman* v. *Oakford* (1860), 5 H. & N. 635.

either notice or payment of wages, in the same way as any other servant; and in such a case the servant will not be entitled to any wages even in respect of the time which has elapsed since the last proper day of payment (*k*).

In the absence of special agreement to the contrary, a domestic servant is entitled to be properly fed and lodged by his or her master or mistress; and if prevented for a time, by sickness or other accident, from the performance of his or her duties, this does not justify the master or mistress in dismissing the servant without such notice or wages as might otherwise be claimed (*l*).

The second species of servants are *Labourers* employed in agriculture, and *Workmen* engaged in trades, manufactures, and the like. These may be engaged for some specified period; and, when so engaged, they cannot, in general, terminate their contracts by giving only a month's notice. The justices of the peace have, in a variety of cases, jurisdiction to determine complaints between workmen and their employers, and to arrange by arbitration, under their direction, such differences as admit of that mode of settlement (*m*); and the justices, when sitting "as a court of summary jurisdiction," have also now conferred upon them, by the Employers and Workmen Act, 1875, a concurrent *civil* jurisdiction with the county courts, in disputes between parties standing in that relation to each other, where the sum claimed does not exceed 10*l*. (*n*). Under the Conciliation Act, 1896, which embodies previous legislation on the subject, boards established for the purpose of settling disputes between employers and workmen by conciliation or arbitration may be registered at the Board of Trade; and the Board

(*k*) *Spain* v. *Arnott* (1817), 2 Stark. 256.

(*l*) *Cuckson* v. *Stone* (1859), 1 Ell. & Ell. 248.

(*m*) See Trust Act, 1831; Master and Workmen (Arbitration) Act, 1837; Hosiery Acts, 1843 and 1845; Silk Weavers Act, 1845; 30 & 31 Vict. (1867) c. 130; Conspiracy Act, 1875.

(*n*) 38 & 39 Vict. c. 90, s. 4; *Hindley* v. *Haslam* (1878), 3 Q. B. D. 481.

of Trade may itself intervene in order to arrange (or to provide for the arrangement of) the dispute or difference.

The third species of servants are called *Apprentices*; and these are infants, bound by indenture, usually for a term of years, to serve their masters, who on their part agree to maintain and instruct them in their trade during such period (*o*). The apprenticeship indenture must be executed by the infant, that being essential to the validity of the transaction (*p*). But there are also *parish* apprentices; for the children of parents unable to maintain them may be apprenticed till the age of twenty-one to such persons as shall, by the poor law authorities, be thought fit to receive them, and this without their own consent or becoming parties to indentures, the apprenticing authority being the *guardians* of the poor law union of which the parish forms part (*q*). The persons selected as the masters of such apprentices were formerly compellable to take them (*r*): but, by the Poor Law Amendment Act, 1844, the reception of a parish apprentice is no longer compulsory.

There are numerous statutes relative to parish apprentices (*s*); and there are also divers enactments under which the justices of the peace may settle disputes between apprentices (whether bound by the parish or not) and their masters, or may discharge the apprentice from his indenture upon reasonable cause shown (*t*). Under the Employers and Workmen Act, 1875, any dispute between

(*o*) *Phillips* v. *Clift* (1859), 4 H. & N. 168; *Eaton* v. *Western* (1882), 9 Q. B. D. 636.

(*p*) *R.* v. *Arnesby* (1820), 3 B. & Ald. 584.

(*q*) Poor Law Amendment Act, 1844, s. 12.

(*r*) *Anon.* (1700), 1 Salk. 67; *Minchcamp's Case* (1702), 2 Salk. 491.

(*s*) Poor Relief Act, 1601, s. 5; 8 & 9 Will. 3 (1696), c. 30; Parish Apprentices Acts, 1778, 1804, and 1816; Poor Law Amendment Act, 1844, ss. 12, 13; 14 & 15 Vict. (1852) c. 11; and Divided Parishes Act, 1876, s. 27.

(*t*) 5 Eliz. (1562—3) c. 4, s. 35; Parish Apprentices Acts, 1792, 1816, and 1842; Parish Officers Act, 1793; Apprentices Act, 1814; Poor Law Amendment Act, 1834, ss. 15, 61.

an apprentice (being an apprentice to whom the statute applies) and his master, may be heard and determined either by the justices (*u*), or by the county court, in the same way as if the dispute was one between an employer and a workman. In such a case the justices may make an order directing the apprentice to perform his duties, and may enforce the order by imprisonment for a period not exceeding fourteen days (*x*) ; or they may, in a proper case, rescind the instrument of apprenticeship, and require the whole or any part of the apprenticeship premium to be refunded (*y*).

It is said that a master may correct his servant (being his apprentice), provided he do it with moderation, though he may not so correct his domestic or other servants (*z*) ; but at the present day a master could hardly be advised to avail himself of this right. An infant apprentice, like a menial servant, is (in the absence of special agreement) entitled to receive proper maintenance from his employer (*a*). He is also entitled to receive medicine and medical attendance (*b*), though in the case of other servants it is not the master's duty to provide these (*c*).

Where the master or mistress is legally bound to provide necessary food, clothing, medical aid, or lodging, and he or she wilfully, and without lawful excuse, refuses or neglects so to do, so that the servant's health is (or is likely to be) permanently injured thereby, such master or mistress is guilty of a criminal offence under the Conspiracy and Protection of Property Act, 1875 (*d*).

(*u*) 38 & 39 Vict. c. 90, s. 5.

(*x*) *Ibid.*, s. 6.

(*y*) By the 52 & 53 Vict. (1889) c. 24, a great number of Acts of an obsolete character relating to workmen and their masters have been repealed.

(*z*) *Gylbert* v. *Fletcher* (1630), Cro. Car. 179 ; *Winstone* v. *Linn* (1823), 1 B. & C. 469.

(*a*) *R.* v. *Gould* (1717), 1 Salk. 381.

(*b*) *R.* v. *Smith* (1837), 8 Car. & P. 153.

(*c*) *Wennall* v. *Adney* (1802), 3 Bos. & Pul. 247.

(*d*) 38 & 39 Vict. c. 86, s. 6.

A master was not, in general, liable at common law to his servant for an injury which was the result of the negligence of a fellow-servant, or of the defective condition of the factory, plant, or other property of the master in or about which the servant was employed, unless it was shown that the master had failed in his duty of supplying proper appliances, and of superintending the work properly himself, or selecting proper persons to do so (*e*). When proper appliances had been supplied, and they afterwards became unsafe, and an injury thereby occurred to a servant, the latter could not recover, unless it was shown that they had become unsafe to the knowledge of the master and without the knowledge of the servant (*f*). The principle in these cases is *volenti non fit injuria* : a servant when he engages to serve a master, undertakes to run all the ordinary risks of the service, including the risk of negligence on the part of a fellow servant (*g*). The common law rule has been materially altered by legislation, but except in so far as altered is still in force.

By the Employers' Liability Act, 1880 (*h*), a workman or his legal personal representatives, or other persons entitled in case of his death, have, in a number of cases, the same right to compensation as if the workman had not been in the service of the employer. These cases include injuries caused (1) by defects in the employer's premises and machinery where such defects are due to, or have not been discovered or remedied through, the negligence of the employer or any servant entrusted by him with the

(*e*) *Priestley* v. *Fowler* (1837), 3 Mee. & W. 1; *Weems* v. *Mathieson* (1861), 4 Macq. 227; *Gallagher* v. *Piper* (1864), 16 C. B. (N.S.) 669.

(*f*) *Griffiths* v. *London and St. Katharine Docks Co.* (1884), 13 Q. B. D. 259; *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q. B. 338.

(*g*) *Tunney* v. *Midland Rail. Co.* (1866), L. R. 1 C. P. 291; *Lovell* v. *Howell* (1876), 1 C. P. D. 161; *Membery* v. *Great Western Rail. Co.* (1889), 14 A. C. 179.

(*h*) 43 & 44 Vict. c. 42.

duty of seeing to their proper condition (*i*), (2) by the negligence of a fellow servant having authority over the injured workman, or being in charge of any signal points, locomotive, or train on a railway (*k*). This Act applies only to workmen falling within the definition of "workman" in the Employers and Workmen Act, 1875. It does not therefore apply to menial servants (*l*); nor does it apply to an omnibus conductor or driver of a tramcar (*m*).

The Workmen's Compensation Act, 1897 (*n*), applies to any workman engaged in any of the following employments: (i) Employment in or about a railway (including a light railway); (ii) in or about a factory (including a dock, or laundry, etc.); (iii) in or about a mine or quarry; (iv) in or about an engineering work; (v) in or about a building which exceeds thirty feet in height, and which is being built or repaired by means of scaffolding, or is being demolished, or in which machinery driven by mechanical power is used for the purpose of the building, repair, or demolition (*o*); (vi) agriculture (*p*). The main provisions of this Act are as follows. (i) Compensation is payable in all cases of injury by accident (whether resulting in death or not) arising out of and in the course of the employment (*q*), unless the injury is attributable to the serious and wilful misconduct of the workman himself (*r*); (ii) Where, by reason of the

(*i*) *Hoske* v. *Samuelson* (1883), 12 Q. B. D. 30; *Cripps* v. *Judge* (1884), 13 Q. B. D. 583.

(*k*) *Cox* v. *Great Western Rail. Co.* (1882), 9 Q. B. D. 106; *Millward* v. *Midland Rail. Co.* (1884), 14 Q. B. D. 68; *McCord* v. *Cammell & Co.*, [1896] A. C. 57.

(*l*) *Pearce* v. *Lansdowne* (1892), 62 L. J. Q. B. 441.

(*m*) *Moryan* v. *London General Omnibus Co.* (1884), 13 Q. B. D. 832; *Cook* v. *North Metropolitan Tramways Co.* (1887), 18 Q. B. D. 683.

(*n*) 60 & 61 Vict. c. 37; General Rules, May, 1898, and September, 1899; Regulations, May, 1898.

(*o*) 60 & 61 Vict. c. 37, s. 7.

(*p*) Workmen's Compensation Act, 1900 (63 & 64 Vict. c. 22).

(*q*) *Powell* v. *Brown*, [1899] 1 Q. B. 157; *Lowe* v. *Pearson*, [1899] 1 Q. B. 261; *Smith* v. *Lancashire and Yorkshire Rail. Co.*, *ibid.*, 141.

(*r*) Sect. 1 (2) (c).

personal negligence or wilful act of the employer, or some person for whose act or default the employer is responsible, the workman has a remedy independently of the Act, he may either claim compensation under the Act, or pursue such independent remedy; but he cannot obtain compensation on both heads (*s*), nor can he obtain compensation both from a stranger who is legally liable, and also from the employer (*t*); (iii) Where the injury is one of disablement (and not of death), the compensation is only payable when the injury results in the workman becoming thereby unable to earn his full wages for at the least two weeks (*u*); (iv) If any question arises as to the existence of a liability under the Act, or the amount of the compensation payable, it must be determined by arbitration in accordance with the provisions contained in the Second Schedule. If the parties are unable to agree upon an arbitrator, the matter is decided by the county court judge, or an arbitrator appointed by him. The Arbitration Act, 1889, does not apply to such arbitrations (*v*). (v) The scale of compensation is as follows: (1) in case of the death of the workman leaving a wife, husband (*w*), parent, or child (*x*) wholly dependent on him, a sum equal to three years' wages, but not being less than 150*l.* or more than 300*l.*; (2) in case of the death of the workman leaving such persons partly dependent on him, a reasonable sum not exceeding the amount which would have been payable in the previous case; (3) if he leaves no dependants, the reasonable expenses of his medical attendance and funeral, not exceeding 10*l.*; (4) where the workman is totally or partially incapacitated, a weekly payment (which may, however, after six months be redeemed for a lump sum) not exceeding 50 per cent.

(*s*) Sect. 1 (2) (b).

(*t*) Sect. 6.

(*u*) Sect. 1 (2) (a).

(*r*) Sched. II., 1—4.

(*w*) "Workman" includes persons of either sex: Workman's Compensation Act, s. 7 (2), and Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1 (1a)).

(*x*) Sect 7 (2), Sched I., and see Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93).

of the workman's average wages for the previous twelve months, or such less period during which he has been in the same employment, and in no case exceeding 1*l.* (*y*). (vi) In order to entitle the injured workman or (in case of death) his dependants, to receive the compensation, notice of the accident must be given as soon as practicable to the employer, and the compensation must be claimed within six months of the accident or (in case of death) within six months of the death ; the notice is to contain the name and address of the person injured, and the cause and date of the injury (*z*). (vii) The Act applies in spite of an agreement between employer and workman to the contrary, except where the Registrar of Friendly Societies has (by his certificate) sanctioned a scheme of compensation, as being not less favourable to the workmen of an employer and their dependants than the provisions of the Act. The registrar continues to have a superintendence over the working of any scheme so sanctioned by him, and may revoke his certificate upon due cause shown (*a*). (viii) In claims for compensation under the Act, as also in claims for damages independently of the Act, the intervention of a contractor or sub-contractor is not to relieve the employer (being an *undertaker* as defined by the Act) (*b*), from liability to pay the injured workman. Such employer, however, has his remedy over against the intervening contractor, and the injured workman is given the option of proceeding either against the employer or against the intervening contractor, though he cannot obtain compensation from both (*c*). (ix) In case of the bankruptcy of the employer or (if the employer is a company) the

(*y*) Sched. I., 1, 13.

(*z*) Sect. 2.

(*a*) Sect. 3.

(*b*) *Undertakers* as defined by the Act (s. 7) are : — in the case of a railway, the company ; in the case of a factory, quarry, or laundry, the "occupier" thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895 ; in the case of a mine, the "owner" thereof within the meaning of the Mines Regulation Acts, 1887 and 1872 ; in the case of an engineering work or building, the persons undertaking the construction, alteration, repair, or demolition.

(*c*) Sect. 4.

winding up of the company, the workman has a first charge for the compensation due under the Act on any insurance moneys coming to the employer in respect of the accident or injury; and the county court judge may give effect to such charge by ordering the insurance moneys to be paid into the Post Office Savings Bank, in the name of the registrar of the court (*d*).

If a servant be guilty of moral misconduct, or of wilful disobedience, or habitual neglect of his master's lawful commands, he may in any such case be dismissed without notice; and no wages can in such a case be claimed save what have actually fallen due before the dismissal (*e*).

When a servant quits his place, the master is not under any legal obligation to give him or her a character (*f*); but if he gives a false character, imputing from malicious motives a fault which does not really exist, he is liable to an action at the suit of the party thus injured (*g*). No action will, however, lie upon a representation contained in a character or made in answer to the inquiries of an intending master, though false in fact, and injurious to the character of the servant (*h*), if it was made *bonâ fide*. Such a representation is held to be a privileged communication; but the privilege is a qualified one, and will therefore be lost if actual malice is shown to exist.

A servant, duly discharging the duties of his service, is entitled to recover his wages, in preference or priority to the general creditors, in case of the death insolvent or of the bankruptcy of his master, or, where the employer is a company, in case of its winding up (*i*).

(*d*) Sect. 5.

(*e*) *Turner* v. *Robinson* (1833), 5 B. & Ad. 789; *Lomax* v. *Arding* (1854), 10 Ex. 734.

(*f*) *Carrol* v. *Bird* (1820), 3 Esp. 201.

(*g*) *Fountain* v. *Boodle* (1842), 3 Q. B. 5.

(*h*) *Child* v. *Affleck* (1829), 9 Barn. & Cress. 403; *Taylor* v. *Hawkins* (1851), 16 Q. B. 308; *Somerville* v. *Hawkins* (1850), 10 C. B. 583.

(*i*) Preferential payments in Bankruptcy Act, 1889 (51 & 52 Vict. c. 62); Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10.

Under the Truck Acts, 1831 to 1896 (*j*), a workman's wages, except in the case of a servant in husbandry, must be paid to him in cash, and not in goods ; and the master's power of making deductions in respect of fines or otherwise is limited. The Shop Clubs Act, 1902 (*k*), proceeds on a similar principle in making it an offence for an employer to impose it as a condition of employment, that a workman should become a member of a shop-club or thrift fund, unless such club or fund is certified in accordance with the Act by the Registrar of Friendly Societies, and duly registered under the Friendly Societies Act, 1896.

[A master may *maintain*, that is, abet and assist, his servant in bringing and prosecuting an action against a stranger ; that is to say, it is not "maintenance," if he do so (*l*). A master may also bring an action against any man for beating or maiming his servant, but in such a case, he must assign, as a special reason for so doing, his own damage by the loss of the service ; and this loss must (under the name of special damage) be proved at the trial (*m*). A master may also justify an assault in the defence of his servant, and a servant in the defence of his master (*n*) ; the master, because he has an interest in his servant, not to be deprived of his service, the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. Also, if any person do cause or procure my servant to leave me, or do hire or retain my servant, being in my service, whereby the servant departs from me and goes to serve another, I may have an action for damages against both the new

(*j*) 1 & 2 Will. 4, c. 37 ; 50 & 51 Vict. c. 46 ; 59 & 60 Vict. c. 44.

(*k*) 2 Edw. 7, c. 21 ; see *Balchin* v. *Ebury* (*Times*, Mar. 12, 1903).

(*l*) 2 Roll. Ab. 115 ; *vide post*, bk. VI. ch. VIII.

(*m*) *Mary's Case* (1603), 9 Co. Rep. 113 ; *Hall* v. *Hollander* (1825), 4 B. & C. 660 ; *Hodsoll* v. *Stallebrass* (1840), 11 A & E. 301.

(*n*) 2 Roll. Ab. 546 ; 1 Hawk. b. i. ch. 60, ss. 23, 24.

[master and the servant, or either of them ; but if the new master did not know that he was my servant, no action lies against him, unless indeed he afterwards refuses to restore him upon information and demand] (*o*). The right of the employer to damages against any person who wilfully induces the employed to break his contract of employment, exists even in cases where the relation is not strictly that of master and servant (*p*). Thus, the master's right to maintain an action for loss of service has been put to the use of enabling a father to maintain an action for the seduction of a daughter, who has thereby become pregnant. The father has the right to the service of his daughter living with him, and the mere right to the service is sufficient to maintain an action of this kind, and proof of actual service is unnecessary (*q*) ; but the action will not lie at the suit of the father, when at the time of the seduction the daughter is actually in the service of some other person (*r*). The damages, in such a case, are not limited to the value of the service, which might be merely nominal ; but substantial damages may be given for the father's injured feelings (*s*).

[As a general rule, a master is answerable to strangers for any injury done or occasioned to them by the act or negligence of his servant, if done either by his express command or authority, or within the course of the servant's employment; the maxim being *qui facit per alium, facit per se* (*t*). In this respect, the law makes no distinction between ordinary servants and those who are more properly and usually termed *agents*, excepting that where the

(*o*) F. N. B. 167, 168 ; *Blake* v. *Lanyon* (1795), 6 T. R. 221 ; *Bowen* v. *Hall* (1881), 6 Q. B. D. 333 ; *Temperton* v. *Russell*, [1893] 1 Q. B. 715.

(*p*) *Bowen* v. *Hall*, *ubi supra*.

(*q*) *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599.

(*r*) *Hedges* v. *Tagg* (1872), L. R. 7 Ex. 283.

(*s*) *Terry* v. *Hutchinson*, *ubi supra*.

(*t*) *Quarman* v. *Burnett* (1840), 6 M. & W. 509 ; *Cox* v. *Midland Rail. Co.* (1849), 3 Exch. 268 ; *Jones* v. *Scullard*, [1898] 2 Q. B. 565.

[agents are independent contractors, the liability of these latter usually (*u*), but not invariably, operates to exempt the principal.] The rule is that a person causing a thing to be done, the doing of which casts on him a duty to take precautions, as for instance, where the doing of the thing involves danger to his neighbour or to the public, cannot escape from the responsibility of seeing the duty performed by delegating it to a contractor (*x*). [Accordingly, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. On the same principle, if a servant, by his negligence, do any damage to a stranger, the master shall answer for the neglect, *e.g.*, if a smith's servant lame a horse while he is shoeing him, an action lies against the master (*y*) ; but in all these cases, the damage must be done in the course of the servant's employment, for otherwise the master is not liable (*y*).]

A master will be liable for the acts of his servant done in the erroneous or wrongful execution of a lawful authority, as, for instance, when the servant on his master's behalf arrests a supposed offender (*z*) ; and this is so, even where the master has forbidden the servant to do the particular act, provided the act was done in the course of his employment, and in the supposed interest of the master (*a*).

With regard to contracts and representations inducing

(*u*) *Overton* v. *Freeman* (1852), 11 C. B. 867.

(*x*) *Bower* v. *Peate* (1876), 1 Q. B. D. 321 ; *Hughes* v. *Percival* (1883), 8 A. C. 443 ; *Dalton* v. *Angus* (1881), 6 A. C. 740 ; *Hardaker* v. *Idle D. C.*, [1896] 1 Q. B. 335 ; *Penny* v. *Wimbledon D. C.*, [1899] 2 Q. B. 72 ; *The Snark*, [1900] P. 105.

(*y*) *Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476 ; *Venables* v. *Smith* (1877), 2 Q. B. D. 279 ; *Stevens* v. *Woodward* (1881), 6 Q. B. D. 319.

(*z*) *Moore* v. *Metropolitan Rail. Co.* (1872), L. R. 8 Q. B. 36.

(*a*) *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526.

a contract, a similar principle applies; the master is bound not merely by the acts of his servant which he has authorised, but by those within the scope of his apparent authority. But he is not bound by those which were not authorised by him, nor within the scope of the authority which the servant appears to have. [Thus, if I pay money to a gentleman's servant not usually employed to receive money for his master, and such servant embezzles it, I must pay the money over again to the servant's master; and if I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes upon trust if he purloin it, so that it comes not to my use, for here is no implied order to the tradesman to trust my servant. But if I usually send my servant upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all the servant takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority (*b*).] So it has been held, that the servant of a horse dealer employed to sell a horse can bind his master by a warranty as to the soundness of the horse (*c*); but the servant of a private owner employed on a single occasion for the like purpose cannot do so (*d*).

A servant is not, in general, himself personally liable in respect of contracts entered into by him in the capacity of servant, *e.g.*, with respect to his purchases from tradesmen for his master's use, if he be known by the person with whom he deals to be acting merely as a servant; and if his authority to purchase be sufficient, he cannot himself be charged for the price of the goods. And a servant cannot for an act of negligence in the execution of a contract be sued by one who was dealing at the time with the master; so that if a parcel be mislaid by a stage

(*b*) Dr. & Stud. d. 2, ch. 42; Noy's Max. ch. 44; *Rushy* v. *Scarlett* (1803), 5 Esp. 76.

(*c*) *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148.

(*d*) *Brady* v. *Todd* (1861), 9 C. B. (N.S.) 592.

coachman, the owner of the coach with whom the contract of carriage was made is liable to the sender, but not the coachman himself (*e*). But if the servant commit a crime, he will himself be criminally liable ; and if he commits a tort, however innocently, in the course of his employment, he may be sued for damages (*f*), either separately from the master, or, where the master also is liable, jointly with him (*f*).

(*e*) *Williams* v. *Cranstoun* (1817), 2 Stark. 82.

(*f*) *Stephens* v. *Elwall* (1815), 4 M. & S. 259 ; *cf. Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757 ; *Barker* v. *Furlong*, [1891] 2 Ch. 172.

CHAPTER II.

OF HUSBAND AND WIFE.

As regards the relation of husband and wife it is proper to premise, that as, in the Roman Catholic faith, marriage ranks as a sacrament of the Church, so it naturally fell, during the period before the Reformation, under the cognizance of the Ecclesiastical Courts. These courts accordingly acquired jurisdiction in various matters of a matrimonial description, including judicial separation, divorce, alimony, suits for the restitution of conjugal rights, suits *causâ jactitationis matrimonii*, and suits to compel the celebration of marriages pursuant to contracts of marriage (*a*). Notwithstanding the reformation in religion, the ecclesiastical jurisdiction remained undisturbed, until, by the Matrimonial Causes Acts, 1857 to 1873 (*b*), a secular court was constituted under the title of the "Court of Divorce and Matrimonial Causes," with jurisdiction over such matters matrimonial as were formerly within the cognizance of the courts ecclesiastical, and with a more extensive jurisdiction. By the Legitimacy Declaration Act, 1858 (*c*), jurisdiction was given to the new court to entertain applications also for declarations of legitimacy, and for declaration of the validity of the marriages of the applicant's parents or grand-parents, and of the applicant's right to be deemed a natural-born

(*a*) 3 Bl. Com. 94.

(*b*) 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 29 & 30 Vict. c. 32; 31 & 32 Vict. c. 77; 36 & 37 Vict. c. 31.

(*c*) 21 & 22 Vict. c. 93; cf. *Frederick* v. *Attorney-General* (1874), L. R. 3 P. & D. 196, 270; *Bosville* v. *Attorney-General* (1887), 12 P. D. 177.

subject. The jurisdiction of the Court so established has now, by the Judicature Act, 1873 (*d*), been transferred to the Probate, Divorce, and Admiralty Division of the High Court of Justice, but with a procedure comparatively unaltered.

In considering the relation of husband and wife, we shall, in the first place, inquire how that relation is contracted; secondly, its legal effect; and, thirdly, the mode of its dissolution.

1. *The manner in which the relation of husband and wife is contracted.*—Marriage (although it is much more than a contract) resembles a contract in so far that the full and free consent of the parties is necessary to its validity. Accordingly, decrees of nullity of marriage have been made in cases where a woman went through the form of marriage under duress, or under such parental influence as to prevent her from being a free agent, and in the belief that the ceremony was merely one of betrothal (*e*). But a fraud, however gross, has no effect upon the validity of a marriage if it is not such as to exclude an actual consent to the marriage. Thus, where a woman fraudulently concealed from her future husband her pregnancy by another man, the court refused to dissolve the marriage (*f*).

Moreover, the rules relating to the capacity of persons to marry differ widely from those relating to the capacity to enter into contracts in general. So long as matrimonial causes were under the jurisdiction of the ecclesiastical courts, the legal disabilities which could prevent the formation of a valid marriage were divided into two classes—canonical and civil. No canonical disability would avoid a marriage unless and until an actual sentence to that effect had been given while both parties were living; and a marriage entered into under a canonical

(*d*) 36 & 37 Vict. c. 66, ss. 3, 34.

(*e*) *Scott* v. *Sebright* (1886), 12 P. D. 21; *Ford* v. *Stier*, [1896] P. 1.

(*f*) *Moss* v. *Moss*, [1897] P. 263.

disability was voidable only, and not void, until such sentence (*g*). On the other hand, the effect of a civil disability was (except in the case of want of age) to render the marriage void *ab initio*; and the civil courts would recognise and give effect to such disability in any case where the validity of the marriage was material to the issue, as upon a claim for dower or inheritance, without the sentence of a court having a matrimonial jurisdiction having been pronounced.

This distinction still is in force; but of the canonical disabilities formerly recognised, one only, namely physical inability to procreate children (*h*), now remains. A pre-contract (*i.e.*, a previous contract to marry a third person), which was formerly a canonical disability, inasmuch as the ecclesiastical courts could order such contract to be performed by the celebration of the marriage, has ceased to be any disability at all since Lord HARDWICKE's Marriage Act of 1753 (*i*), by which it was provided, that no proceedings should be had in any ecclesiastical court to compel the celebration of a marriage by reason of any contract. The disabilities resulting from consanguinity and affinity, which were formerly canonical, were made civil disabilities by the Marriage Act, 1835 (*k*).

[Disabilities of the *civil* kind are commonly grouped under these classes, namely, (1) A prior marriage still subsisting; (2) Insanity; (3) Relationship by blood or marriage: and (4) Want of age. Each of these four disabilities will now be considered.

1. The first of them, namely, a prior marriage still subsisting, wants no particular observation, excepting this,

(*g*) 1 Bl. Com. 434; Co. Litt. 33 a; *Bury's Case* (1598), 5 Rep. 98; 1 Roll. Ab. 360.

(*h*) 1 Bl. Com. 434; see *M. & D.* (1885), 10 P. D. 75.

(*i*) 26 Geo. 2, c. 33, s. 13, repealed and re-enacted on this point by the Marriage Act, 1823 (4 Geo. 4, c. 76, s. 27). The disability of pre-contract was removed in certain cases by 32 Hen. 8 (1540), c. 38; but that statute was in this respect repealed by 2 & 3 Edw. 6 (1548), c. 23.

(*k*) 5 & 6 Will. 4, c. 54.

that the second marriage is to all intents and purposes void (*l*).

2. The marriage of a lunatic, unless where contracted in a lucid interval, is void (*m*), provided that the insanity is such as to prevent a real appreciation of the engagement apparently entered into (*n*). The invalidity of the marriage may be asserted, and a decree of nullity obtained, as well by the sane as by the insane party to the marriage (*o*). In order to avoid the difficulty of proving the exact state of the party's mind at the time of the marriage, it has been specifically provided by the Marriage Act, 1811 (*p*), that the marriage of a person already found lunatic shall be totally void, unless he or she has been previously declared to have, at the date of the celebration, regained a sound mind.

3. The third (and most frequent) civil incapacity is undue proximity of relationship, whether of consanguinity or of affinity.

This disability received statutory recognition by a statute of 1540 (*q*), which enacted that "no reservation or "prohibition, God's law except, shall trouble or impeach "any marriage without the Levitical degrees" (*r*).

The following marriages are deemed to be within the Levitical degrees, and are accordingly prohibited. (1) Marriages contracted between persons lineally related *in infinitum* (*s*); (2) Marriages contracted between collaterals

(*l*) Bro. Ab. tit. *Bastardy*, pl. 8; *Riddleston* v. *Wogan* (1602), Cro. Eliz. 858; *Pride* v. *Bath* (1695), 1 Salk. 120; *R.* v. *Harborne* (1835), 2 A. & E. 540.

(*m*) *Hancock* v. *Peaty* (1867), L. R. 1 P. & D. 335.

(*n*) *Durham* v. *Durham* (1885), 10 P. D. 80.

(*o*) *Hunter* v. *Edney* (1881), 10 P. D. 93.

(*p*) 51 Geo. 3, c. 37.

(*q*) 32 Hen. 8, c. 38; see also earlier statutes since repealed giving a list of prohibited degrees, 25 Hen. 8 (1534), c. 22, and 28 Hen. 8 (1536), c. 7; *Sherwood* v. *Ray* (1831), 1 Moo. P. C. 353, and the 99th canon of 1603.

(*r*) Levit. xviii., xx.; *Brook* v. *Brook* (1861), 9 H. of L. Cas. 232.

(*s*) Gibs. *Cod.* 413; Burn, tit. *Marriage*, I.; *Extrav. de Consanguin.* etc. Can. 8; Grot. *De*

(whether of the whole blood or of the half-blood) (*t*) to the third degree inclusive, according to the mode of computation in the civil law (*u*) ; (3) Marriages contracted between persons related by affinity within the corresponding degrees lineal or collateral (*a*). The blood relations of a man's wife are always related to him by affinity, and the blood relations of a man are similarly related to his wife. Thus, a man may not marry his own sister or his deceased wife's sister (*b*), for both are related to him in the second degree ; nor his own sister's daughter, or his deceased wife's sister's daughter (*c*), for both are in the third degree. But he may marry his first cousin, for she is in the fourth degree. On the other hand, the blood relations of the husband are not at all necessarily related to the blood relations of the wife ; hence two brothers may marry two sisters, or father and son a mother and daughter. And the husband is not related to the *affines* of his wife, so that a man may marry the widow of his deceased wife's brother. As already stated, the incapacity in respect of proximity of relationship was formerly but a *canonical* disability (*d*) ; but by the Marriage Act, 1835, it was made a *civil* disability, that statute having enacted, that all marriages thereafter celebrated between persons within the prohibited degrees shall be absolutely *void*. But this statute has no operation on marriages celebrated abroad between persons domiciled abroad, who are by the law of their domicile permitted to marry, as between a woman and the brother of her deceased husband. Such a marriage,

Jure Belli et Pacis, l. 2, ch. 5, s. 12. But it is clear that cases of marriages between remote lineal relations cannot arise.

(*t*) Bac. Abr. *Marriage*, A.

(*u*) Vaughan, 218 ; *R.* v. *Chadwick* (1847), 11 Q. B. 173; *De Wilton* v. *Montefiore*, [1900] 2 Ch. 481.

(*a*) Vaughan, 302 ; *Brook* v. *Brook* (1861), 9 H. L. C. 193.

(*b*) See last note.

(*c*) *De Wilton* v. *Montefiore*, *supra* ; *The Queen* v. *Brighton* (*Inhabitants of*) (1861). 1 B. & S. 447.

(*d*) Sir T. Raym. 464 ; *R.* v. *Inhabitants of Wye* (1838), 7 A. & E. 771.

celebrated in Italy, where it is permitted, has been held valid in this country (*e*).

4. [The fourth civil disability is want of age, a disability which, as it avoids other contracts, so it avoids this contract also. But it is not necessary to the contract of marriage that the parties should have obtained their full age of *twenty-one*; for a male person is enabled by law to consent to matrimony at the age of fourteen, and a female at the age of twelve (*f*). But even though the male be under fourteen, or the girl under twelve, the marriage is regarded as being inchoate only and imperfect (*g*), not void; so that either of the parties, upon coming to the proper age for his or her consent, may disagree to (and so avoid) the marriage (*h*), or else may affirm it.] A marriage between persons, either of whom is under the age of seven years, was by the canon law treated as absolutely void (*i*), and would probably be so regarded at the present day, though Lord COKE tells us that "if the wife be past the age of nine years at the time of the death of her husband, she shall be endowed, albeit he were but four years old."

And here note, that what is above stated is to be understood of the actual marriage, by which the parties become man and wife; for *a promise to marry* at a future time, which, like other contracts, gives a right of action for damages in case of its violation (*k*), is not binding on the defendant unless he or she be at the time of the full age of twenty-one years. But, where there are mutual

(*e*) *Hwwy - Hunt* v. *Bozzelli*, [1902] 1 Ch. 751. It is otherwise where persons domiciled in this country go abroad temporarily for the purpose of contracting a marriage prohibited by the English law (*Mette* v. *Mette* (1859), 1 Sw. & Tr. 416).

(*f*) Co. Litt. 79 a; 1 Hale, P. C. 17.

(*g*) Co. Litt. by Harg. 79 b, n. (1).

(*h*) Co. Litt. 79 a, 79 b; Bac. Ab. *Infancy*, A.

(*i*) Burn, *Ecc. Law*, tit. *Marriage*, I.; Pollock & Maitland, *History*, II., 388; Co. Litt. 33 a.

(*k*) *Wild* v. *Harris* (1849), 7 C. B. 999.

promises to marry made by two persons, one of the age of twenty-one, and the other under that age, the first may be sued for a breach of his promise, although the latter cannot be sued (*l*).

We have next to consider the forms necessary to the validity of a marriage. The canon law recognised the validity for many purposes of a marriage by mere consent, whether *per verba de præsenti* or *per verba de futuro subsequente copula*; but the temporal courts refused to give full effect to a marriage not solemnized in church or at any rate in the presence of a priest (*m*). The rule that at common law the presence of a clergyman in Anglican orders is essential to the validity of a marriage for all purposes was finally established by *R.* v. *Millis* in 1843 (*n*). If this requirement is complied with, a marriage is, as regards form, validly celebrated in cases where no further formalities are prescribed by statute, as in the case of a marriage on board a British man-of-war (*o*). But in the majority of cases the formalities necessary to a valid marriage are now regulated by the Marriage Acts, 1811 to 1898, of which the most important are those of 1823 and 1836 (4 Geo. IV. c. 76; 6 & 7 Will. IV. c. 85).

By the Marriage Act, 1823 (repealing and in part re-enacting the Act 26 Geo. II. c. 33, commonly called "Lord Hardwicke's Act"), the first formality required is, the previous publication of *banns* upon three suc-

(*l*) *Hood* v. *Ward* (1732), Str. 937; *Warwick* v. *Bruce* (1813), 2 Man. & Sel. 205; Infants' Relief Act, 1874 (37 & 38 Vict. c. 62); *Coxhead* v. *Mullis* (1878), 3 C. P. D. 439; *Northcote* v. *Doughty* (1879), 4 C. P. D. 385; *Ditcham* v. *Worrall* (1880), 5 C. P. D. 410.

(*m*) Pollock & Maitland, Bk. ii., c. vii.; *Haydon* v. *Gould* (1710), 1 Salk. 119.

(*n*) 10 Cl. & F. 534. The Lords were equally divided, and the force of the decision rests only on the principle of *presumitur pro negante*. The decision was followed in *Catherwood* v. *Caslon* (1844), 13 M. & W. 261. It has been decided that a clergyman cannot validly celebrate his own marriage, no other clergyman being present (*Beamish* v. *Beamish* (1861), 9 H. L. C. 273).

(*o*) *Culling* v. *Culling*, [1896] P. 116.

cessive Sundays in the church where the marriage is to be solemnized (*p*); or, in lieu thereof, a *licence* from the proper ecclesiastical authority, that the marriage shall be had without banns (*q*), that is, either a "special" licence from the Archbishop of Canterbury (*r*), or a "common" licence from the ordinary or his surrogate (*s*). The banns must be published, and the licence granted, in the true names of the marrying parties (*t*); and the marriage must be solemnized within, at the latest, three months after the complete publication of the banns, or grant of the licence (*u*). The Act also requires, that (except by special licence) the marriage shall be in a church or chapel wherein banns may be lawfully published (*x*), and shall take place between the hours of eight and twelve in the forenoon; but by the Marriage Act, 1886 (*y*), the time has now been extended to three in the afternoon. The presence of two witnesses is required, in addition to that of the minister who celebrates the marriage (*z*).

In order to prevent the marriage of persons under the age of twenty-one without the consent of their parents or guardians, the statute also provides, that in the case of the publication of banns of a person under twenty-one, not being a widower or a widow, (either of whom is deemed emancipated by the first marriage,) if the parent or guardian of the infant openly signifies his dissent at the time the banns are published, the publication shall be

(*p*) Marriage Act, 1823, s. 2; Lyndw. 273, 274.

(*q*) Marriage Act, 1823, s. 10; Can. 101; Marriage Act, 1857, s. 6.

(*r*) 25 Hen. 8 (1534), c. 21; Act, 1823, ss. 10, 20; Act, 1836, s. 1.

(*s*) 10 & 11 Vict. (1847) c. 98, s. 5.

(*t*) *R.* v. *Wroxton* (1833), 4 Barn. & Adol. 641; *Gompertz* v. *Kensit* (1872), L. R. 13 Eq. 369; *Fendall* v. *Goldsmid* (1877), 2 P. D. 263.

(*u*) Act, 1823, ss. 9, 19.

(*x*) *Ibid.* ss. 3, 4, 12, 13; and see 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 5 Geo. 4, c. 32; 6 Geo. 4, c. 92; 11 Geo. 4 & 1 Will. 4, c. 18; 6 & 7 Will. 4, c. 85, ss. 26—34; 7 Will. 4 & 1 Vict. c. 22; 1 & 2 Vict. c. 107, ss. 16, 33, 34; 7 & 8 Vict. c. 56; 20 Vict. c. 19, s. 9; 23 Vict. c. 24.

(*y*) 49 & 50 Vict. c. 14.

(*z*) Act, 1823, s. 28.

void (*a*). And in furtherance of the same object, no licence to marry (neither a common licence nor a special licence) may be granted, unless oath shall be first made by one of the parties that he or she believes that there is no impediment of kindred or alliance, or other lawful impediment, to the proposed union, and that one of the parties hath, for the space of fifteen days immediately preceding the issue of the licence, had his or her usual place of abode within the parish or chapelry within which the marriage is to be solemnized; and (where either of the parties, not being a widower or widow, shall be under the age of twenty-one years), that the consent of the person or persons whose consent is required has been obtained, or, else, that there is no person who has authority to give such consent (*b*). The consent required is that of the father; or if the father be dead, then that of the lawfully appointed guardian (*c*); and failing him, then of the mother being unmarried; and failing her, then of the guardian appointed by the High Court of Justice (*d*). In case the person whose consent is required is *non compos*, or unreasonably withholds his or her consent, relief against the difficulty so occasioned is obtainable on petition to the Lord Chancellor (*e*).

Any person celebrating a marriage otherwise than in accordance with the provisions of the statute renders himself liable to severe penalties (*f*); and, in the following cases, the marriage is *null and void*, that is to say: (1) If the marrying parties knowingly and wilfully intermarry (unless by special licence) in a place other than a church or chapel wherein banns may be lawfully published; (2) If they knowingly and wilfully intermarry without either due publication of banns, or else a licence; or (3) If

(*a*) Act, 1823, ss. 8, 16.
(*b*) Sect. 14.
(*c*) Sect. 16.
(*d*) Sect. 16; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34.
(*e*) Act, 1823, s. 17; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 94.
(*f*) Act, 1823, s. 21.

they knowingly and wilfully consent to or acquiesce in the solemnization of their marriage according to the office of the Church, by a person not being in holy orders (*g*). But where a marriage by licence or with banns has been solemnized between persons either of whom is under age, by means of the false oath or fraudulent procurement of one of the parties, then the Act merely provides, that the party offending shall be liable to forfeit all property which would otherwise accrue to him or to her from the marriage (*h*) ; and subject thereto, the marriage remains valid.

Whether a marriage celebrated by a person whom both parties erroneously suppose to be in holy orders would be valid, is a doubtful question. The better opinion is that it would be valid (*i*). The Marriages Validation Act, 1888 (*k*), was passed *ex majore cautela*, in order to remove doubts as to the validity of certain marriages which had been solemnized by a notorious felon (W. E.), who had falsely pretended to be a priest.

A list of other Acts passed from time to time for the purpose of curing irregularities in marriages, which but for such irregularities would have been valid, is given below (*l*).

The Marriage Act, 1823, following Lord Hardwicke's Act, had required that all marriages taking place in England, excepting where both the parties were Quakers or Jews (*m*), should be solemnized according to the rites

(*g*) Sect. 22.

(*h*) Sects. 23, 24 ; *Att.-Gen.* v. *Clements* (1871), L. R. 12 Eq. 32 ; *In re Martindale*, [1894] 3 Ch. 193.

(*i*) Eversley, *Domestic Relations*, p. 97, and cases there cited.

(*k*) 51 & 52 Vict. c. 28.

(*l*) 3 Geo. 4, c. 75 ; 4 Geo. 4, cc. 5, 91 ; 3 & 4 Will. 4, c. 45 ; 5 & 6 Will. 4, c. 54 ; 5 & 6 Vict. c. 113 ; 10 & 11 Vict. c. 58 ; 12 & 13 Vict. c. 68, s. 20 ; 14 & 15 Vict. c. 97, s. 25 ; 16 & 17 Vict. c. 122 ; 17 & 18 Vict. c. 88 ; 18 & 19 Vict. c. 66, c. 81, s. 13 ; 19 & 20 Vict. c. 70 ; 20 & 21 Vict. c. 29 ; 22 Vict. c. 24 ; 24 & 25 Vict. c. 16 ; 28 & 29 Vict. c. 81 ; 36 & 37 Vict. cc. 1, 25, 28 ; 41 & 42 Vict. c. 61 ; 47 & 48 Vict. c. 20 ; and 49 Vict. c. 3.

(*m*) Sect. 31 ; see now Marriage (Society of Friends) Acts, 1860 & 1872, 23 & 24 Vict. c. 18 ; 35 & 36 Vict. c. 10.

and ceremonies of the Church of England (*n*). The injustice towards dissenters involved in this requirement led to the passing of the Marriage Act, 1836 (6 & 7 Will. IV. c. 85). By this Act and the Acts amending it (*o*), all persons are enabled to be married according to such religious rites as they may think fit, or without any religious rites at all.

Before a marriage can be celebrated under the Marriage Act, 1836, and the Acts amending it, it is necessary to obtain the certificate of the Superintendent Registrar of Marriages for the district; which certificate may be either a certificate *without licence*, or a certificate *with licence*. We propose to describe first the steps to be taken when a certificate without licence is obtained, and afterwards to point out the modifications which must be made when the certificate is one with licence.

(1.) A person intending to be married on *a registrar's certificate without licence*, delivers to the superintendent registrar of the district within which both the persons about to marry have dwelt for not less than seven days—or if they have dwelt in different districts for that time, then to the superintendent registrar of each district—a "notice" in the prescribed form of his or her intention to marry (*p*); and the notice is entered by the registrar (who is entitled to the fee of one shilling for the entry), in a book called *The Marriage Notice Book*, open at all reasonable times, and without fee, to all persons desirous of inspecting the same (*q*). The notice must state (i.) the names and descriptions of the parties; (ii.) the dwelling-place of each party, and the length of time during which each has resided there; (iii.) the church or other building

(*n*) Act, 1823, s. 2.

(*o*) Births and Deaths Registration Act, 1837 (7 Will. 4 & 1 Vict. c. 22); Marriage Act, 1840 (3 & 4 Vict. c. 72); Marriage Registration Act, 1856 (19 & 20 Vict. c. 119); Marriage Act, 1898 (61 & 62 Vict. c. 58).

(*p*) See 6 & 7 Will. 4, c. 85, s. 4; 19 & 20 Vict. c. 119, s. 3, and Sch. (A).

(*q*) 6 & 7 Will. 4, c. 85, s. 5.

in which the marriage is to be solemnized, which must in general be within the district where one of the parties has dwelt for the period stated in the notice (*r*) ; (iv.) that the marriage is to be without licence. The person giving the notice subscribes thereto a solemn *declaration*, stating (i.) that he or she believes that there is no impediment of kindred or alliance or other lawful hindrance to the marriage ; (ii.) that he or she has, for the space of *seven* days immediately preceding, had his or her usual place of abode and residence within the district of the registrar to whom the notice is given ; (iii.) when either party, not being a widower or widow, is under the age of twenty-one, that the consent of the person whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent is by law required (*s*). This notice, (or a copy thereof, under the hand of the registrar,) is suspended or affixed by him in some conspicuous place in his office, during *twenty-one* successive days next after the day when it was entered in the Marriage Notice Book (*t*).

The next step is to obtain the registrar's "certificate" of the notice having been duly entered. Any person whose consent would have been required by law to the marriage of the contracting parties, under an *ecclesiastical* licence, immediately before the passing of the Marriage Act, 1836, is authorized to forbid the issue of such

(*r*) 3 & 4 Vict. c. 72, s. 1. The building stated in the notice may, however, in the case of *Quakers and Jews*, be one out of the district or districts in which the parties dwell (3 & 4 Vict. c. 72, s. 5 ; 19 & 20 Vict. c. 119, s. 13) ; and may also be so, in the case of *other* parties, where there is not within the district in which either of the parties dwells any registered building in which the marriage may be solemnized in the form such parties desire to adopt (3 & 4 Vict. c. 72, s. 2). The building stated may also be out of such district or districts, provided it be the usual place of worship of the parties, or one of them, and not more than two miles from the district in which the notice is given (19 & 20 Vict. c 119, s. 14).

(*s*) 19 & 20 Vict. c. 119, s. 2.

(*t*) *Ibid.* s. 4.

certificate; and may do so by writing the word "forbidden" opposite the entry of the notice, and subscribing thereto his or her name and place of abode, and the character in which he or she is authorized to interfere. And in case the issue of the certificate is thus lawfully forbidden, the notice and all proceedings thereon are utterly void (*u*). A caveat may also be entered by any person against the issue of the certificate (*x*). Supposing, however, that during the period for which the notice has been suspended in the office, no valid impediment to its issue has been shown to the satisfaction of the registrar, nor the issue forbidden in manner above mentioned, the certificate, after the expiration of the twenty-one days, is to be issued upon the request of the person delivering the notice (*y*); and the certificate expresses, that notice of the intended marriage in such a church or building has been duly entered, and that the issue of the certificate has not been forbidden by any person authorized so to do. And for this document, the registrar is entitled to receive the fee of one shilling (*z*). Then, immediately upon the certificate being issued, or at any time afterwards within three calendar months from the entry of the notice, the marriage may take place (*a*); and may be solemnized according to any one of the four following methods.

First, the marriage may be solemnized in *some building certified as a place of religious worship and registered for the solemnization of marriages*, and according to such form and ceremony as the parties may think fit to adopt (*b*), subject only to the following requirements being complied with: (i.) Some registrar of the district (acting personally or by deputy) (*c*), or else an "authorized person" within

(*u*) 6 & 7 Will. 4, c. 85, ss. 9, 10.
(*x*) *Ibid.* s. 13.
(*y*) 19 & 20 Vict. c. 119, s. 4, and Sch. (B).
(*z*) *Ibid.* s. 4.
(*a*) 6 & 7 Will. 4, c. 85, s. 20.
(*b*) *Ibid.* ss. 18—20; see also 7 Will. 4 & 1 Vict. c. 22, s. 35; 18 & 19 Vict. c. 81; 19 & 20 Vict. c. 119, ss. 17, 24.
(*c*) 6 & 7 Will. 4, c. 85, ss. 17, 20; as to appointment of a deputy, see 19 & 20 Vict. c. 119, s. 16.

the meaning of the Marriage Act, 1898 (*d*), must be present; (ii.) in addition two or more credible witnesses must be present; (iii.) the marriage must be celebrated with open doors and between the hours of eight in the forenoon and three in the afternoon (*e*); (iv.) in some part of the ceremony, and in the presence of the registrar and witnesses, each of the parties must say—"I do "solemnly declare that I know not of any lawful impedi- "ment why I, A. B., may not be joined in matrimony to "C. D."; and each of the parties must say to the other, "*I call upon these persons here present to witness that* I, "A. B., do take thee, C. D., to be my *lawful* wedded "wife (*or* husband)" (*f*).

Or, secondly, the marriage may be solemnized at *the office of the superintendent registrar*, in his presence and in that of some "registrar of the district," and also of two other witnesses, and with open doors, and between the hours aforesaid; and the parties are to make the same declaration and use the same words as in the case of marriage in a certified and registered place of worship (*g*). But at no marriage had in such office may any religious service be used, although the parties are permitted by statute to add such religious ceremony afterwards as is ordained or used by the denomination to which they belong (*h*), such latter celebration being, however (in such case), without any effect in law.

Or, thirdly, the marriage may be solemnized according to the rites of the Church of England, the church in which the marriage is solemnized being situate within the district of the superintendent registrar by whom the certificate is issued, and the consent of the minister

(*d*) 61 & 62 Vict. c. 58, ss. 4, 6. The "authorised person" is the person (usually the minister) authorised by the trustees or governing body of the building.

(*e*) Marriage Act, 1886 (49 & 50 Vict. c. 14), s. 1.

(*f*) The words in italics may be omitted in the case of a marriage celebrated in the presence of an "authorised person."

(*g*) 6 & 7 Will. 4, c. 85, s. 21.

(*h*) 19 & 20 Vict. c. 119, s. 12.

being obtained, and the marriage being solemnized by a duly qualified clergyman according to the office of the Church (*i*).

Or, fourthly, the marriage may be solemnized according to the usages of the Quakers or of the Jews, where the parties are of those persuasions respectively (*k*). A marriage may even be celebrated in accordance with the usages of the Quakers between persons of whom one or both do not belong to the Society of Friends, if such marriage is authorised by the general rules of that society (*l*).

Such, then, are the different methods in which, in a marriage upon a registrar's certificate without licence, the solemnization may be had; but as to each of them, it is material to repeat, that the building in which the marriage takes place must be that specified in the notice and certificate (*m*).

(2.) A person intending to be married on *a registrar's certificate with licence*, gives a notice to that effect and obtains a certificate as in the former case; and the course of proceeding and the state of the law applicable to such notice and certificate are in either case the same, subject only to the following differences. First, if both the persons about to marry do not dwell in the same superintendent registrar's district, notice need not be given to the registrar of *each* district, but only to the registrar of the district in which *one* of such persons resides; and it will be sufficient also, if the notice states how long he or she has there resided, without making any statement of the same kind with respect to the other party (*n*). Secondly, the declaration subscribed to the notice must

(*i*) 6 & 7 Will. 4, c. 85, ss. 1, 4; 7 Will. 4 & 1 Vict. c. 22, s. 36; 19 & 20 Vict. c. 119, s. 11.

(*k*) 6 & 7 Will. 4, c. 85, ss. 2, 39; 3 & 4 Vict. c. 72, s. 5; 19 & 20 Vict. c. 119, s. 21.

(*l*) 23 Vict. c. 18; 35 Vict. c. 10.

(*m*) 6 & 7 Will. 4, c. 85, s. 42; 61 & 62 Vict. c. 58, s. 4.

(*n*) 19 & 20 Vict. c. 119, s. 6.

state, that the person giving it has, for the space of *fifteen* days immediately preceding, had his or her usual place of abode and residence within the district of the registrar to whom the notice is given (*o*). Thirdly, it is not requisite, that either the notice, or a copy thereof, should be suspended in the office of such registrar (*p*). Fourthly, the certificate may be obtained after the expiration of *one* whole day (instead of *twenty-one* days) next after the entry of the notice (*q*). Having obtained the certificate, the applicant next procures from the registrar a *licence*, and for this the officer is entitled to receive from the party the sum of 1*l.* 10*s.*, over and above the amount paid for the necessary stamps on the instrument (*r*). Then, after the issue of the licence, and within three calendar months from the entry of the notice, the marriage may take place (*s*) ; and it may be solemnized according to any of the several methods before stated, except that of the Church of England, subject to the rules and distinctions already laid down in respect of them (*t*). But the registrar may not grant any licence for marriage in a church or chapel of the Church of England (*u*), it being the design of the legislature not to interfere with the exclusive privilege in that respect previously vested in the archbishop and other ecclesiastical authorities.

No marriage upon the certificate of a registrar (either *with* or *without* licence), may be solemnized in any building registered and certified for religious worship, without the consent of the minister thereof, or of one of the trustees, overseers, deacons, or managers ; nor in any registered building of the Church of Rome, nor in any church or chapel of the Church of England, without the consent of the minister thereof (*x*).

(*o*) Sect. 2.
(*p*) Sect. 5.
(*q*) Sect. 9.
(*r*) Sect. 10.
(*s*) Sect. 9 and Sch. C.
(*t*) 6 & 7 Will. 4, c. 85, ss. 2, 20; 19 & 20 Vict. c. 119, s. 21; 61 & 62 Vict. c. 58, ss. 4, 5.
(*u*) 6 & 7 Will. 4, c. 85, s. 11.
(*x*) 19 & 20 Vict. c. 119, s. 11.

Every notice, certificate, and licence, and all proceedings thereupon under the Marriage Act, 1836, and the amending Acts, are void, unless the marriage is celebrated within three calendar months from the entry of the notice (*y*).

Every marriage under these Acts is void, if the parties knowingly and wilfully intermarry (i.) in a place other than that specified in the notice and certificate, or (ii.) without due notice to the superintendent registrar, or (iii.) without certificate duly issued, or without licence (where licence is required), or (iv.) in the absence of the "registrar of the district" or of the superintendent registrar, or of the "authorised person," where the presence of such persons respectively is required (*z*).

A valid marriage, procured by means of a wilfully false notice, certificate, or declaration, exposes the party offending to the same consequences as are provided under the Marriage Act, 1823, with regard to marriages procured by false oath or fraudulent procurement, viz. a forfeiture of all the property which would otherwise accrue to the offending party from the marriage (*a*).

All marriages celebrated in England, whether under the Marriage Act, 1823 (*b*), or under the more recent Marriage Acts, are now registered. By the Marriage Acts, 1836 and 1898 (*c*), and the Births and Deaths Registration Acts, 1836 to 1874 (*d*), the duty of registering marriages is imposed on every clergyman of the Church of England (*e*), "authorised person" (*f*), and registrar (*g*), by whom or in whose presence a marriage

(*y*) 6 & 7 Will. 4, c. 85, s. 15; 7 Will. 4 & 1 Vict. c. 22, s. 3; 19 & 20 Vict. c. 119, Scheds. (B) and (C).

(*z*) 6 & 7 Will. 4, c. 85, s. 42.

(*a*) 19 & 20 Vict. c. 119, s. 19.

(*b*) 4 Geo. 4, c. 76.

(*c*) 6 & 7 Will. 4, c. 85; 61 & 62 Vict. c. 58.

(*d*) 6 & 7 Will. 4, c. 86; 7 Will. 4 & 1 Vict. c. 22; 21 & 22 Vict. c. 25; 37 & 38 Vict. c. 88.

(*e*) 6 & 7 Will. 4, c. 86, ss. 31, 33.

(*f*) 61 & 62 Vict. c. 58, ss. 7—11.

(*g*) 6 & 7 Will. 4, c. 85, ss. 23, 24.

is celebrated, and upon the registering officer of the Quakers and secretary of a synagogue (*h*), in whose district or synagogue a Quaker or Jewish marriage is celebrated. Except in the case of marriages celebrated before a registrar, such registration is to be in duplicate in two books, one of which when filled is to be delivered to the superintendent-registrar of the district, and the other retained in the custody of the parish clergyman, or otherwise in the local custody of the religious body. In the same way, the registrar transmits the register book kept by him, when filled, to the superintendent-registrar. In addition to this, every clergyman and other person whose duty it is to register marriages, is required to deliver to the superintendent registrar of the district, in the months of April, July, October, and January, in every year, a copy (certified under his hand, and on durable materials) of all entries of marriages in such book for the current quarter; and such certified copies are four times a year to be transmitted by the superintendent registrar to the Registrar-General (*i*).

None of the Marriage Acts extend to the Royal Family (*k*); nor do these Acts extend to the marriages contracted by British subjects in Scotland or in Ireland, or in any foreign country (*l*). Marriages celebrated out of England are therefore (so far as regards the *form of celebration*) considered as valid by our law, provided they are made in such form as is sufficient by the law of the place where they are solemnized; and this is so, even though the parties have eloped out of England, on purpose to evade the forms of marriage prevailing in England (*m*). But the mar-

(*h*) 6 & 7 Will. 4, c. 86, ss. 31, 33; 19 & 20 Vict. c. 119, s. 22.

(*i*) 6 & 7 Will. 4, c. 86, s. 34.

(*k*) 4 Geo. 4, c. 76, s. 30; 6 & 7 Will. 4, c. 85, s. 45. As to the disabilities of the Royal Family in respect of marriage, see bk. iv., pt. i., ch. iv.

(*l*) 4 Geo. 4, c. 76, s. 31; 6 & 7 Will. 4, c. 85, s. 45.

(*m*) *Scrimshire* v. *Scrimshire* (1752), 2 Hagg. 395; *Forster* v. *Forster and Berridge*, 4 B. &

riage must be a Christian, which means a monogamous, marriage (*n*).

In order to facilitate the celebration abroad of the marriages of British subjects, various Acts have been passed (*o*). These Acts were repealed, and with certain amendments re-enacted, by the Foreign Marriage Act, 1892 (*p*), by which any marriage solemnized abroad in accordance with its provisions is declared valid, if one at least of the parties thereto is a British subject. A marriage under this Act must be celebrated with open doors in the presence of a "marriage officer" and two witnesses, either according to the rites of the Church of England, or according to such form as the parties may think fit to adopt, provided that the same words are used as are prescribed by s. 20 of the Marriage Act, 1836. A "marriage officer," within the meaning of this Act, is appointed either by a marriage warrant signed by a Secretary of State, or by his Majesty in Council, and is usually a British ambassador or consul, governor or high commissioner, or similar officer, or, in the case of marriages celebrated on board one of his Majesty's ships (*q*), the commanding officer of the ship. The place of celebration must be the official house of the marriage officer, or in the last-mentioned case, the ship of which he is commander. The Act contains provisions as to the giving of notice, the requirement of consent in the case of infants, registration and the like matters, corresponding to those applicable in the case of marriages celebrated in England. The Act

mith, 187; *Dalrymple* v. *Dalrymple* (1811), 2 Hagg. Con. 54; *Swift* v. *Kelly* (1835), 3 Knapp. 257; Co. Litt. by Harg. 79 b, n. (1).

(*n*) *Bethell* v. *Hildyard* (1888), 38 C. D. 220; *Brinkley* v. *Att.-Gen.* (1890), 15 P. D. 76.

(*o*) Marriages Validity Act, 1823 (4 Geo. 4, c. 91); Consular Marriage Act, 1849 (12 & 13 Vict. c. 68); Consular Marriage Act, 1868 (31 & 32 Vict. c. 61); Marriage Act, 1890 (53 & 54 Vict. c. 47); Foreign Marriage Act, 1891 (54 & 55 Vict. c. 74).

(*p*) 55 & 56 Vict. c. 23.

(*q*) *Cf.* as to marriages on board a man-of-war, *Culling* v. *Culling*, [1896] P. 116; and 42 & 43 Vict. c. 29.

also declares the validity of marriages celebrated within the lines of a British army serving abroad, by a chaplain or other person officiating under the order of the commanding officer (*r*). By the Registration of Births, Deaths, and Marriages (Army) Act, 1879 (*s*), provision has been made for the registration of marriages celebrated abroad of the officers and soldiers of his Majesty's land forces.

As regards marriages celebrated abroad within any of his Majesty's possessions, it is provided by the Colonial Marriages Act, 1865 (*t*), that any law passed by the legislative body in such possession for the purpose of establishing the validity of any marriage solemnized therein, shall give to such marriage the same validity out of the limits of such possession as it would, previously to the Act, have given within those limits; provided, however, that no marriage shall be thereby made valid, unless the parties thereto were competent to contract the same according to the law of England.

II. *The legal effect of the relation of husband and wife.*—[For some purposes, the husband and wife become, by their marriage, a single person in the eye of the law (*u*); and it was accordingly a principle of the old common law, that a man could not grant anything to his wife, or enter into any covenant with her (*x*). No action could be brought by either of them against the other; and all compacts between them, made before marriage, were avoided (or at least suspended) by their intermarrying (*y*).

(*r*) *Cf. Waldegrave Peerage* (1837), 4 Cl. & F. 649 decided under 4 Geo. 4, c. 91.

(*s*) 42 & 43 Vict. c. 8; and see as to entering in the log marriages celebrated on board a merchant ship the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 240.

(*t*) 28 & 29 Vict. c. 64.

(*u*) Co. Litt. 112 a. The most striking example of this is afforded by the rule that a grant to husband and wife and a third person operates to give only a moiety to husband and wife; and this rule has not been affected by the Married Women's Property Act, 1882 (*Jupp* v. *Buckwell* (1888), 39 Ch. D. 148).

(*x*) *Jupp* v. *Buckwell, ubi supra*; *Beard* v. *Beard* (1744), 3 Atk. 72.

(*y*) *Nedham's Case* (1611), 8 Rep. 136 a.

[The husband, however, might have granted to or contracted with a trustee for his wife; and, by conveying land to a third person to her use, he might have conferred upon her the legal estate in the land. Also, he might have devised or bequeathed anything to her by will; for his will did not take effect till the union was severed by his death (*z*). Also, where the wife acted in the execution of a mere power or authority, she might have conveyed an estate to her husband; *e.g.*, if she had authority under a will to sell, she might have effectually sold to him (*a*). And she might have been agent for her husband; for that implied no separation from, but was rather a representation of, her lord (*b*).]

The principle of the unity of husband and wife would appear to be inapplicable as between a Queen Regnant and her Consort, though in two cases it was deemed necessary to exclude by statute the Consort from any interest in the Queen's property (*c*). And the wife of the King of England "is of capacity to grant and to take, sue and be sued, as a "*feme sole*, at the common law" (*d*).

It long remained a fundamental rule in our law of evidence, that husbands and wives could not in trials of any sort, whether *civil* or *criminal*, be received as witnesses for or against each other (*e*), excepting that in a criminal prosecution against the husband for treason, or for violence to the person of his wife, the evidence of the latter was admitted (*f*). But in modern times, it came to be deemed expedient greatly to relax these rules of the earlier law; and accordingly by the Evidence Amendment Act, 1853, and the Evidence Further Amendment Act, 1869 (*g*), the husbands and wives of the parties to *civil* proceedings

(*z*) Co. Litt. 112 a.

(*a*) *Ibid.*

(*b*) 1 Bl. Com. 442; *M'George* v. *Egan* (1839), 5 Bing. N. C. 196.

(*c*) 1 Mar. st. 3, c. 2; 3 & 4 Vict. c. 3.

(*d*) Co. Litt. 133 a.

(*e*) Hawkins, P. C. b. 2, ch. 46, s. 16; 1 Hale, P. C. 301; *Wedgwood* v. *Hartley* (1839), 10 Ad. & El. 619.

(*f*) *Lord Audley's Case*, Str. 633; Hale, *ubi sup.*; 1 East, P. C. 454.

(*g*) 16 & 17 Vict. c. 83; 32 & 33 Vict. c. 68.

(including proceedings instituted in consequence of adultery) were made both competent and compellable to give evidence.

As regards criminal proceedings, the incompetence of husband and wife to give evidence has been only partially removed. In the first place, in a small number of cases, husband and wife have been made both competent and compellable witnesses. This class comprises proceedings which are only in form criminal; such as indictments for the non-repair of highways (Evidence Act, 1877 (*h*)), and also proceedings under the Married Women's Property Acts, 1882 and 1884 (*i*), in respect of offences by husband and wife against each other's property. In the latter case, however, a defendant is not compellable to give evidence. In the second place, in a considerable class of cases, husband and wife are competent witnesses both for prosecution and for the defence, but are not compellable to give evidence. This class includes (*inter alia*) proceedings under the Offences against the Person Act, 1861, the Criminal Law Amendment Act, 1885, and the Prevention of Cruelty to Children Act, 1894 (*k*). Thirdly, by the Criminal Evidence Act, 1898 (*l*), husbands and wives are made competent witnesses *for the defence* as regards criminal proceedings generally. It must also be remembered that, as regards proceedings, whether civil or criminal, the rule still holds, that no husband or wife is compellable to disclose any communication made to him or her by the other during the marriage (*m*).

[But though the wife was antiently considered in law for most purposes as the same person with her husband, she was for other purposes held to be a distinct person;

(*h*) 40 & 41 Vict. c. 14.

(*i*) 45 & 46 Vict. c. 75, ss. 12, 16; and 47 & 48 Vict. c. 14; see *Reg.* v. *Brittleton* (1884), 12 Q. B. D. 266.

(*k*) 24 & 25 Vict. c. 100, ss. 48—55; 48 & 49 Vict. c. 69; 57 & 58 Vict. c. 41; and see 61 & 62 Vict. c. 36, s. 4, and Schedule.

(*l*) 61 & 62 Vict. c. 36, s. 1.

(*m*) 16 & 17 Vict. c. 83, s. 3; 61 & 62 Vict. c. 36, s. 1 (d).

[but even so, she was deemed subordinate, being under his cover, protection, and influence. She was therefore called, in our law-French, a *feme coverte*, or in Latin, *fœmina viro cooperta*; and her condition during marriage was and still is called her *coverture* (*n*).] We have now to consider the effect of such coverture, in respect 1. Of her person; 2. Of her property; and 3. Of her contracts and other transactions.

1. *As to the wife's person.*—It was formerly thought, that the custody of this belongs of right to her husband (*o*); and by some antient authorities it was even considered that he might give her moderate correction (*p*), though in the reign of Charles the Second, the power of correction began to be doubted (*q*). But in more recent times it has been held that a husband has no such right to the custody of his wife as a parent has to the custody of a child; and the court has refused to grant a *habeas corpus* on the application of a husband, in order to restore to his custody a wife who was voluntarily living apart from him (*r*). So, too, a husband is not entitled to imprison his wife in order to enforce restitution of conjugal rights (*s*), nor can a decree for such restitution be now enforced by attachment (*t*). But it is possibly the case that our law still permits a husband to restrain his wife of her liberty, in case of gross misbehaviour, or at any rate as a means of preventing such misbehaviour (*u*).

2. *As to the wife's property.*—By the common law, any *freehold estate* of which the wife was seised at the time of

(*n*) But see as to the true meaning of the phrase *feme coverte*, Pollock & Maitland, ii. 404 (n).

(*o*) *In re Cochrane* (1840), 8 Dowl. 635.

(*p*) Moore, 874; F. N. B. 80.

(*q*) 1 Sid. 113; *Lord Leigh's Case* (1674), 3 Keb. 433.

(*r*) *R.* v. *Leggatt* (1852), 18 Q. B. 781.

(*s*) *R.* v. *Jackson*, [1891] 1 Q. B. 671.

(*t*) Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68).

(*u*) *Child* v. *Hardyman* (1731), 2 Str. 875; *R.* v. *Jackson*, *ubi supra*.

the marriage, or of which she became seised afterwards, became (subject to the exceptions presently to be mentioned) by law vested in her husband and herself during the coverture ; and the husband was entitled to the profits, and had the sole control and management (*x*), though he could not (save under the specific provisions of a statute) convey or charge the wife's freehold interest for any longer period than while the marriage continued (*y*). And if the wife was seised in actual possession at any time during the marriage of an estate *of inheritance*, (whether in fee simple or in fee tail,) and there was a child of the marriage born alive and capable of inheriting the property, then the husband, upon his wife's decease, became solely seised of such estate for his life ; and was said in that case to be *tenant by the curtesy of England* (*a*). But, save to the extent of these limited rights of the husband, the freeholds of the wife were not affected by the marriage. As regards the alienation of the wife's freeholds, there was originally no mode by which they could, even with the husband's concurrence, be conveyed during the coverture ; for the rigour of the antient law declared the wife incapable, in any case, of binding herself or her heirs in any direct mode of alienation. Indirect modes of alienation were, however, introduced at an early date ; and, for a long time, the ordinary mode was the *fine*, in the course of levying which the wife was privately examined as to whether her act was voluntary. The Fines and Recoveries Act, 1833, substituted for this mode of alienation a deed duly acknowledged by the wife, her husband concurring in, and not merely consenting to, the deed. The acknowledgment must be made before, and the wife privately examined by, a judge of the High Court, or one of the perpetual commissioners appointed

(*x*) 1 Wms. Saund. 253, n. 4; *Robertson* v. *Norris* (1845), 11 Q. B. 916.

(*y*) Bac. Ab. *Leases* (C.) ; 2 Saund. by Wms. 180, n. (*q*).

(*a*) Litt. s. 35.

for taking married women's acknowledgments, or a special commissioner (*b*).

As regards the *leaseholds* of which the wife was possessed at the time of her marriage, or which accrued to her during coverture, the husband (with the exceptions presently to be noticed) became by the common law and by force of the marriage possessed of them, in her right (*c*); and he was not only entitled to the profits and management thereof during their joint lives, but he might also have disposed of them as he pleased, by any act during the coverture. They were even liable for his debts; and, if he survived her, they were absolutely his own (*d*). But (if she survived him) he could not bequeath them by his will (*e*); for, on his death, they remained to her by virtue of her original title, and did not go to his executors or administrators. And the rights of the husband did not extend to property held by the wife *in auter droit*, as in the capacity of executrix (*f*).

The *personal chattels* of the wife belonging to her at the time of the marriage, or accruing to her during coverture, became by the common law, with the exception of *choses in action*, the absolute property of the husband (*g*); but this again did not apply to property to which the wife was only entitled *in auter droit* (*h*). The wife's *choses in action* did not by the common law become the husband's until he recovered them by law, or reduced them into possession (*i*); and if he died before doing so, they remained or survived to the wife surviving her husband. But if she should have predeceased her husband, then, as he was, by

(*b*) 3 & 4 Will. 4, c. 74, ss. 77—84; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7.

(*c*) Co. Litt. 46 b, 351 a, 300 a; Rast. 655 a; *Wallis* v. *Harrison* (1839), 5 Mee. & W. 142.

(*d*) Com. Dig. *Bar. & Feme*, E.

(*e*) Plowd. 418; Com. Dig. *ubi sup.*

(*f*) 1 Roll. Ab. 88.

(*g*) Co. Litt. 351 b; *Ayling* v. *Whicher* (1837), 1 Nev. & Per. 416; *Carne* v. *Brice* (1840), 7 Mee. & W. 183.

(*h*) Went. *Off. Ex.* 7.

(*i*) Co. Litt. 351 b.; *Fitzgerald* v. *Fitzgerald* (1850), 8 C. B. 592.

the common law, entitled to obtain administration of her effects for his own benefit, he, upon becoming administrator of his wife's estate, became the owner of them in right of that title, and for his own benefit, subject only to the debts (if any) of the wife; and if he, having so survived, should have died before the choses were reduced into possession, then his legal personal representatives on taking out administration to the wife might have recovered them, for the benefit of the deceased husband's estate, subject only to the debts of the wife (*k*). If the wife's *chose in action* was reversionary, and therefore incapable of being reduced into possession, neither husband nor wife, nor both together, could have effectually disposed thereof during the coverture (*l*). The *paraphernalia* of the wife, that is, her apparel and ornaments suitable to her rank and degree, if not disposed of by the husband in his lifetime, remained to her, if she survived him, and did not pass to the husband's representatives; but they were liable for his debts (*m*).

The rules of the common law above stated have been largely modified and in great part abrogated by recent legislation; but a knowledge of them is still necessary to an understanding of this legislation, which we shall now consider.

(1.) By the Married Women's Reversionary Interests Act, 1857, commonly called Malins' Act (*n*), a married woman was enabled to dispose of her reversionary interests in personal estate, whether vested or contingent (unless restrained by the instrument under which she is entitled thereto, and unless they are secured to her by her own marriage settlement) by any deed in which her husband

(*k*) *Smart* v. *Tranter* (1890), 43 Ch. D. 587; *Waller* v. *Atkinson*, [1898] 1 Ch. 637; *Elliott* v. *North*, [1901] 1 Ch. 424.

(*l*) *Purdew* v. *Jackson* (1823), 1 Russ. 1.

(*m*) 2 Bl. Com. 435.

(*n*) 20 & 21 Vict. c. 57, ss. 21, 25. See also 21 & 22 Vict. c. 108, s. 8; and 27 & 28 Vict. c. 44.

concurs, and which is duly acknowledged in the manner required by the Fines and Recoveries Act, 1833, with regard to her conveyance of real estate.

(2.) By s. 25 of the Matrimonial Causes Act, 1857, a wife judicially separated from her husband is to be considered as a *feme sole* for the purposes of property acquired subsequently to the separation; and a wife who obtains a protection order under sect. 21 of that Act, on the ground of desertion, is deemed, during the continuance of such order, to be, and during the desertion to have been, in the same position as if she had obtained a decree of judicial separation.

Under the Summary Jurisdiction (Married Women) Act, 1895 (*o*), a married woman whose husband has been convicted of an aggravated assault upon her within the meaning of the Offences against the Person Act, 1861 (*p*), or of such other assault as mentioned in the Act, or has deserted her, or by his persistent cruelty or neglect to provide maintenance for her and her infant children, has caused her to leave him, may obtain an order from a court of summary jurisdiction to the effect that she be no longer bound to cohabit with him; and such order while in force has all the effects of a decree of judicial separation on the ground of cruelty.

(3.) The greatest change in the law relating to married women's property has, however, been made by the Married Women's Property Acts of 1870 and 1882 (*q*). By the former of these Acts it was provided that where any freehold, copyhold, or customaryhold property should *descend* during the marriage upon any woman who was married after the passing of the Act (viz. 9th August, 1870) as heiress or co-heiress of an intestate, or where such woman should, during her marriage, become entitled to any personal property as next of kin or one of the next of

(*o*) 58 & 59 Vict. c. 39, repealing and re-enacting with additions 41 & 42 Vict. c. 19, s. 4, and 49 & 50 Vict. c. 52.

(*p*) 24 & 25 Vict. c. 100.

(*q*) 33 & 34 Vict. c. 93; 45 & 46 Vict. c. 75.

kin of an intestate, or to any sum of money not exceeding 200*l.* under any deed or will, the rents and profits of the real estate, and the absolute interest in the personal estate, should, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman "for "her separate use," and her receipts alone should be a good discharge for the same.

This Act is now superseded by the Married Women's Property Act, 1882, under which, as from the 1st day of January, 1883, every woman who is married on or after that date is to hold as her separate property all real and personal property, either then already belonging to her or afterwards coming to her in any manner, including wages, earnings, and gains earned or made by her in any occupation which she carries on separately from her husband; and she may dispose by will or otherwise, of all such property in the same manner as if she were a *feme sole*. And any woman already married before the 1st day of January 1883, is to hold as her separate property and to have the like power of disposition over all property, real or personal, the title to which, whether vested or contingent, has accrued to her after that date (*r*), including such wages, earnings, and gains as aforesaid.

The Married Women's Property Act, 1882, has further provided, in continuation and amplification of the like provisions contained in the Married Women's Property Act, 1870, that a wife (whenever married) may effect an insurance upon her own or her husband's life "for her separate use" (*s*), and may also acquire property independently of her husband in such deposits as she shall have made in a savings bank, or other bank, or as she shall have invested in the funds, in a joint-stock company, or in an industrial, provident, friendly, benefit building, or loan society, provided always, that she shall not have used her husband's

(*r*) *Reid* v. *Reid* (1886), 31 Ch. D. 402; *Stockley* v. *Parsons* (1890), 45 C. D. 51.

(*s*) Married Women's Property Act, 1882, s. 11.

moneys without his consent, and shall not have deposited or invested such moneys in fraud of his creditors (*t*).

3. *As to the wife's contracts and other transactions.*—A married woman might at common law act independently of her husband in all matters in *auter droit*,—as where she was, at the time of her marriage, executrix, or exercised a mere authority or power. Yet a married woman could not, without her husband's consent, accept the office of executrix, so as to make him liable for her *devastavit*, though as between herself and her co-executor, a payment to a married woman who had taken probate without such consent would be valid (*u*). But in respect of transactions on her own account, her coverture used to subject her to a variety of disabilities. Thus, first, she was incompetent, without her husband's consent, to make a will, either of lands or of chattels (*x*), and incapable generally of contracting, or of doing any other act which would bind either herself or her husband (*y*), unless as his agent, by his express or implied authority (*z*), and acts done by her of her own authority with that intention were merely void. But a married woman might contract as a *feme sole* so as to bind herself in case her husband were civilly dead, or where (by the custom) she carried on trade in the city of London on her own sole account, and without any interference on the part of her husband (although even in the last case she could not be made bankrupt), or where she had been judicially separated from her husband, or had obtained a protection order. Secondly, she was incapable of suing or being sued without her husband being joined, except in a few cases in which she was treated

(*t*) Married Women's Property Act, 1882, ss. 6—10.

(*u*) Com. Dig. *Baron and Feme* (P); Co. Litt. 112 a; *Pemberton* v. *Chapman* (1858), 1 E. B. & E. 1056.

(*x*) *Smart* v. *Tranter* (1890), 43 Ch. D. 587; *Waller* v. *Atkinson*, [1898] 1 Ch. 439.

(*y*) Co. Litt. 112 b.

(*z*) *Lane* v. *Ironmonger* (1844), 13 Mee. & W. 368; *Brown* v. *Ackroyd* (1856), 5 El. & Bl. 819; *Johnson* v. *Sumner* (1858), 3 H. & N. 261; *Debenham* v. *Mellon* (1880), L. R. 6 App. Ca. 24.

as a *feme sole*, as for instance, where her husband was civilly dead, or where she had been judicially separated or had obtained a protection order (*a*). This incapacity existed even in the case of actions in respect of her separate estate (*b*), of an estate of which she was executrix (*c*), or of her contracts made in the course of her separate trade (*d*). But now, by the Married Women's Property Act, 1882, she is capable (i.) of disposing by will or otherwise of her separate property; (ii.) of rendering herself liable in respect of her separate property on any contract; (iii.) of suing and being sued in contract or in tort or otherwise, as if she were a *feme sole* without her husband being joined (*e*). She may also act and sue and be sued as executrix or administratrix or trustee without her husband being joined (*f*). But a married woman who is a trustee, unless she is a bare trustee (*g*), cannot even now convey, except by a deed in which her husband joins, and which is duly acknowledged by her (*h*).

It was held under the Married Women's Property Act, 1882, that a married woman having no separate estate could not bind herself by contract, so as to render liable property subsequently acquired by her (*i*), and that the will of a married woman was not effectual to dispose of property acquired by her after she became discovert, unless re-executed (*j*).

(*a*) 20 & 21 Vict. c. 57, ss. 21, 25, 26; *Ramsden* v. *Brearley* (1875), L. R. 10 Q. B. 147.

(*b*) *Hancocks* v. *Lablache* (1878), 3 C. P. D. 197.

(*c*) *Mounson* v. *Bourn* (1641), Cro. Car. 519.

(*d*) *Caudell* v. *Shaw* (1791), 4 T. R. 361.

(*e*) Married Women's Property Act, 1882, s. 1 (1) (2). She may even obtain an injunction against her husband (*Symonds* v. *Hallett* (1883), 24 Ch. D. 346).

(*f*) Married Women's Property Act, 1882, s. 18.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 16; *Brooke and Fremlin's Contract*, [1898] 1 Ch. 647.

(*h*) *Harkness and Allsopp's Contract*, [1896] 2 Ch. 358.

(*i*) *Palliser* v. *Gurney* (1887), 19 Q. B. D. 519.

(*j*) *Re Price, Stafford* v. *Stafford* (1885), 28 Ch. D. 709.

Accordingly, the Married Women's Property Act, 1893 (*k*), provides (sect. 1), that every contract entered into by a wife (otherwise than as agent) after the 5th December, 1893, shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; and her contract so entered into will bind all separate property which she may at that time or thereafter be possessed of or entitled to, and will also be enforceable, by process of law, against all property which she may thereafter, while discovert, be possessed of or entitled to, not being, of course, property settled to her separate use without power of anticipation. Section 3 of the same Act provides that sect. 24 of the Wills Act, 1837 (*l*) (by which a will is to be construed as if made immediately before the death of the testator), shall apply to the will of a married woman, whether she was or was not entitled to any separate property at the time of making it; and that such will shall not require to be re-executed or republished after her husband's death.

The old law, in consideration of a married woman's incapacity to sue, gave her certain special privileges or exemptions. Thus, as regards rights and causes of action accruing to her during coverture, the Statutes of Limitation did not begin to run until the determination of the coverture; but, since the Married Women's Property Act, 1882, this exemption, at least as regards all actions falling within that Act, has been abolished (*m*).

Again, although the mere fact of marriage does not make the wife the agent of the husband so as to enable her to pledge his credit (*n*), yet where husband and wife are living together and she is managing his household, his

(*k*) 56 & 57 Vict. c. 63.

(*l*) 1 Vict. c. 26.

(*m*) *Lowe* v. *Fox* (1885), 15 Q. B. D. 667; *Weldon* v. *Neal* (1884), 51 L. T. 289.

(*n*) *Manby* v. *Scott* (1661), 1 Sid. 109; *Debenham* v. *Mellon* (1880), 5 Q. B. D. 394; L. R. 6 App. Ca. 24.

authority to her to act as his agent, to that extent, will *primâ facie* be presumed; though the presumption is capable of being repelled by special circumstances, as by notice to the particular tradesman by whom she is supplied not to trust her, or even (in cases where the husband has not by his conduct, as for instance by paying bills, held her out as his agent) by a simple determination of her agency. When a husband has turned his wife out of doors and deserted her, or she has left him under circumstances which justify her in doing so, the wife has by necessity an authority to pledge the husband's credit for necessaries for herself and her children of whom she has the lawful custody (*o*). But the husband incurs no such liability,—(1) if the separation be against his will and without sufficient excuse arising from his ill-treatment (*p*); or (2) if she be dismissed from him for adultery (unless committed with his connivance), or if, during the separation, she commit adultery (*q*); or (3) if she has agreed to accept from him a certain allowance for her maintenance during separation, and the allowance is regularly paid, or if sufficient provision is otherwise made for her while they are living apart (*r*); and (4) in the case of a judicial separation, if alimony has been decreed the wife, and it is paid, she may not bind him for necessaries (*s*).

A married woman was also exempt from the bankruptcy laws even though she had separate estate (*t*), and this exemption continues notwithstanding the Married Women's Property Acts, 1882 and 1893 (*u*), unless she is carrying on a trade separately from her husband (*v*).

(*o*) *Montague* v. *Benedict* (1823), 3 B. & C. 673; *Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559; *Wilson* v. *Glossop* (1888), 20 Q. B. D. 354.

(*p*) *Atkyns* v. *Pearce* (1857), 2 C. B. (N.S.) 763.

(*q*) *Cooper* v. *Lloyd* (1859), 6 C. B. (N.S.) 519.

(*r*) *Johnson* v. *Sumner* (1858), 3 H. & N. 261; *Eastland* v. *Burchell* (1878), 3 Q. B. D. 432.

(*s*) 20 & 21 Vict. c. 85, s. 26.

(*t*) *Ex parte Jones, In re Grissell* (1879), 12 Ch. D. 484.

(*u*) *Re Gardiner* (1887), 20 Q. B. D. 249; *Re a Debtor*, [1898] 2 Q. B. 576.

(*v*) Married Women's Property Act, 1882, s. 1 (5).

At common law a husband was liable upon his wife's contracts made before marriage, and also for her torts whether committed before or during the marriage; but his liability, unless enforced by action during the marriage, came to an end with its determination (*x*), though he would be liable as her administrator to the extent of the assets received by him as such (*y*). An action to enforce such liability during the coverture was required to be brought against husband and wife jointly (*z*). But as the law now stands, under sects. 14 and 15 of the Married Women's Property Act, 1882, the husband thus sued jointly with his wife in respect of a cause of action arising against her *before* the marriage, is liable only to the extent of such assets as he received or might (but for his own default) have received with her; and if he received none, then he will have his costs of defence, and the judgment for the debt or damages will be separate against the wife, and may be satisfied out of the wife's separate estate, if she has any (*a*). A husband is, however, still liable for his wife's torts committed *during* the coverture, although jointly with his wife (*b*). But inasmuch as a married woman was formerly incapable of binding either herself or her husband (except as his agent) by contract, it has been laid down that no action lies against husband and wife in respect of a wife's fraud directly connected with a contract purported to be made by her, as where she obtained a loan of money by a false representation that she was unmarried (*c*); and *semble* the husband's liability has not been increased by the extended contractual powers now conferred on the wife.

(*x*) *Heard* v. *Stamford* (1735), 3 P. Wms. 409; *Capel* v. *Powell* (1865), 34 L. J. C. P. 168.

(*y*) *Turner* v. *Caulfield* (1879), L. R. Ir. 7 Ch. 347.

(*z*) *Mitchinson* v. *Hewson* (1797), 7 T. R. 348.

(*a*) *Scott* v. *Morley* (1887), 20 Q. B. D. 120.

(*b*) *Seroka* v. *Kattenburg* (1886), 17 Q. B. D. 177; *Earle* v. *Kingscote*, [1900] 2 Ch. 585.

(*c*) *Fairhurst* v. *Liverpool Adelphi Loan Association* (1854), 23 L. J. Ex. 163.

It now becomes desirable to advert to the manner in which the common law rules relating to husband and wife were modified by the principles of equity, even before any of the statutes above referred to were made. Contracts between husband and wife, and grants by either party to the other, being sufficiently evidenced, were effectual in equity (*d*); trusts also in favour of the wife, whether created by the husband or by a stranger, were sustained in equity. And though by the old common law her property (with the qualifications already stated) vested in her husband in such manner that she could have no separate property, yet in contemplation of equity she had always a separate and independent estate in whatever property was secured to her through the medium of a *trustee*, provided the intention in that behalf of the grantor was distinctly declared (*e*). As it is a rule in equity that a trust shall never fail for want of a trustee, it followed that where the intention to give a married woman property for her *separate use* was sufficiently declared, such gift would be effectual, and the property would be her separate estate, even though the donor should have omitted to appoint any trustee. Consequently, if no trustee was appointed, the property vested at law in the husband; and the court of equity, in such in a case, considered the husband himself as her trustee (*f*). It was this equitable principle of the wife's separate estate which formed the model of the legal separate estate created by the Married Women's Property Acts, 1870 and 1882.

As regards the property of a married woman which was *not* settled to her separate use, although the courts of equity followed the common law, so far as to allow the husband to claim it as his own; yet these courts would not assist the husband's claim, where such assistance was

(*d*) *Stanning* v. *Style* (1734), 3 P. Wms. 334.

(*e*) Fonb. Tr. Eq. 94; *In re Tarrey's Trust* (1866), L. R. 1 Eq. Ca. 561; *Massy* v. *Rowen* (1869), L. R. 4 H. L. 288.

(*f*) *Bennet* v. *Davis* (1725), 2 P. Wms. 316.

necessary, except upon the condition of his making an adequate provision for her and her children out of the fund. Later, the woman herself was permitted to take proceedings as plaintiff in order to have this provision made out of any property over which a court of equity had jurisdiction (*g*). The wife's right to this provision was known as her *equity to a settlement*.

Equity would also allow the separate estate of a married woman to be conveyed or charged by her at her pleasure, and that either *inter vivos* or by will; and such property was also subject in equity to her debts contracted on the faith of her separate estate (*h*). Gifts of property, however, to the separate use of a married woman, are often accompanied with a clause in restraint of *anticipation*, that is, a proviso against her making any assignment of her interest, by way of anticipation of the income during the coverture; and such a proviso (notwithstanding the general rule invalidating restrictions on alienation) is held effectual in courts of equity (*i*). To such an extent is this so, that for her debts contracted on the faith of her separate estate, nay, even for her own active frauds (*k*), the property so restrained cannot apart from statute be made liable. The restraint continues only during coverture, though it will, unless put an end to by the woman while discovert, revive on a subsequent marriage (*l*). But property subject to a restraint on anticipation, will not, even if the woman becomes discovert, become liable to payment of debts contracted by her while covert (*m*). Apart from statute, the court had no power to lift off the restraint on anticipation,

(*g*) *Elibank* v. *Montolieu* (1799), 5 Ves. 737; 1 W. & T. L. C. 621; *Re Briant* (1888), 39 Ch. D. 471.

(*h*) Bac. Ab. *Bar. & F.* 507; *Taylor* v. *Meads* (1865), 34 L. J. Ch. 203; *Pike* v. *Fitzgibbon* (1881), 17 Ch. D. 454.

(*i*) *Woodmeston* v. *Walker* (1831), 2 Russ. & M. 197; *Brown* v. *Pocock* (1831), *ib.* 210; *Harnett* v. *Macdougall* (1845), 8 Beav. 187.

(*k*) *Jackson* v. *Hobhouse* (1817), 2 Mer. 483; *Ellis* v. *Johnson* (1886), 31 Ch. D. 537.

(*l*) *Tullett* v. *Armstrong* (1839), 1 Beav. 1.

(*m*) *Barnett* v. *Howard* (1900), 2 Q. B. 784.

even when it was for the woman's own clear benefit to do so (*n*); but by the Conveyancing Act, 1881, s. 39, the court is now enabled, with her consent, to remove the restraint when it is for the wife's benefit that it should be removed (*o*). By sect. 45 of the Trustee Act, 1893 (*p*), re-enacting a similar provision of the Trustee Act, 1888 (*q*), the court may now impound the interest of a married woman restrained from anticipation in a trust fund by way of indemnity to a trustee who has committed a breach of trust at her instigation or request, or with her consent in writing. By the Married Women's Property Act, 1893, s. 2, the costs of litigation *instituted by her or on her behalf* may now also be ordered to be paid out of such property (*r*).

Before concluding the subject of married women's property, it will be desirable (in this place) to consider, although briefly, the subject of *marriage settlements*, and the subject of *separation deeds* between husband and wife.

1.—With respect to MARRIAGE SETTLEMENTS.—When a marriage is contemplated, it is a common practice for the intended husband to make a settlement for the benefit of the intended wife. Where the husband is entitled to real estate, this provision usually takes the form of a small rentcharge, called *pin money*, which is to be paid to the wife during her husband's life, and is intended for her private purposes, such as dress, and a larger rentcharge called a *jointure*, which is to be paid to her after his death, in the event of her surviving him. A jointure is usually expressed to be in lieu of dower and freebench. These rentcharges were formerly secured by limitations of the husband's real estates to special trustees for long terms of

(*n*) *Robinson* v. *Wheelwright* (1856), 6 D. M. & G. 535.

(*o*) See *Harrison* v. *Harrison* (1889), 40 Ch. D. 418.

(*p*) 56 & 57 Vict. c. 53.

(*q*) 51 & 52 Vict. c. 59, s. 6.

(*r*) *Hood Barrs* v. *Cathcart*, [1894] 3 Ch. 376; *Hood Barrs* v. *Cathcart*, [1895] 1 Q. B. 873, and see *Hood Barrs* v. *Heriot*, [1897] A. C. 177.

years ; but since the Conveyancing Act, 1881 (*s*), this has become unnecessary. If there is hereditary rank or a title to be supported, or if it is in contemplation to found a family, the settlement generally contains also provisions for entailing the bulk of the landed estate on the issue of the marriage, by limiting it to the husband for life, and after his death, to the first and other sons successively in tail male, and then to the daughters in tail. On the intended wife's part, if she possesses property of her own, and the amount is large, a settlement thereof is frequently made, providing sufficiently for the wife, and conferring beneficial interests therein on the husband, and providing for the younger children of the marriage, and (in the case of the failure of issue) providing for the return of the property in whole or in part to the wife herself or to her relations, subject always to the estates or interests which may have taken effect.

A marriage settlement may be made, either in contemplation of the marriage, or after the marriage has taken place. An ante-nuptial settlement is made on what the law deems a valuable consideration, viz., the future marriage, so that such a settlement cannot, in the absence of fraud, be impeached even by those to whom the husband is indebted at the time he makes it (*t*), but is binding and valid against all the world (*u*). A post-nuptial settlement, on the other hand, is in general considered *voluntary*, that is, for no valuable consideration ; and, if it relate to lands or tenements, it used to be void, by the effect of the statute 27 Eliz. (1584) c. 4, as against subsequent purchasers of the same lands for valuable consideration, whether they purchased with notice of the settlement or not, the husband being allowed to defeat in this way his own previous

(*s*) 44 & 45 Vict. c. 41, s. 44. See Elphinstone, *Introduction to Conveyancing*, pp. 364, 373.

(*t*) *Spirett* v. *Willows* (1868), L. R. 4 Ch. 407 ; *Kent* v. *Riley* (1872), 14 Eq. 190.

(*u*) *Brown* v. *Jones* (1744), 1 Atk. 190 ; *Campion* v. *Cotton* (1810), 17 Ves. 272.

gift (*x*) ; and a mortgagee and a lessee (*y*) were esteemed purchasers within the meaning of this Act. But now, by the Voluntary Conveyances Act, 1893 (*z*), a voluntary settlement of lands will not be impeachable, *merely* on the ground of its voluntary character.

A post-nuptial settlement, whether relating to real or personal property, still is, however, by the effect of the statute 13 Eliz. c. 5, void as against all creditors to whom the husband was indebted at the time of the settlement, without possessing adequate means of payment: and also as against his subsequent creditors, if he made it with the fraudulent view of defeating their future claims (*a*) ; but, subject to the provisions of the Bankruptcy Act, 1883 (*b*), as against all other persons, such a settlement, though voluntary in its nature, is effectual. There are instances, however, in which even a post-nuptial settlement is deemed to be not voluntary, but valid as against all the world ; as in the case where it is executed either in pursuance of a written agreement to that effect entered into before the marriage (*c*), or as the condition of the husband's obtaining possession of the property to which the wife is equitably entitled (*d*), or in consideration of an additional portion paid to him by her friends after the marriage (*e*).

2. With respect to SEPARATION DEEDS.—Although the law looks with the greatest disfavour on any agreement, the object of which is to relieve the parties from the duties of the conjugal relation, yet where the husband and wife have actually come to a resolution to live apart, the courts

(*x*) *Doe* d. *Otley* v. *Manning* (1807), 9 East, 59 ; *Doe* d. *Newman* v. *Rushum* (1852), 17 Q. B. 724.

(*y*) *Cracknall* v. *Janson* (1879), 11 Ch. Div. 1 ; *In re Walhampton Estate* (1884), 26 Ch. Div. 391.

(*z*) 56 & 57 Vict. c. 21.

(*a*) *Stileman* v. *Ashdown* (1742), 2 Atk. 481 ; *Freeman* v. *Pope* (1870), L. R. 5 Ch. 538.

(*b*) 46 & 47 Vict. c. 52 ; see *supra*, bk. ii. pt. ii. ch. vi.

(*c*) *Doe* v. *Rowe* (1838), 4 Bing. N. C. 737 ; *Brown* v. *Jones* (1744), 1 Atk. 190.

(*d*) *Wheeler* v. *Caryl* (1751), Amb. 121.

(*e*) *Russell* v. *Hammond* (1738), 1 Atk. 13.

have repeatedly recognized the validity of agreements on their separation (*f*). In a separation deed, the husband usually covenants with trustees appointed on behalf of the wife, or now even with the wife herself (*g*), that he will provide certain sums for the wife's separate maintenance; the trustees on their part (or now the wife herself) covenanting with the husband to indemnify him against her debts, and the wife releasing, or covenanting to release, all claims for jointure and dower, or thirds. The deed also contains, in general, clauses by which both the husband and the wife covenant with the trustees, or with each other, not to molest or interfere the one with the other of them (*h*), and not to sue for the restitution of conjugal rights (*i*). Under such an agreement, the wife is entitled to receive her separate allowance, so long as the separation continues, and so long as she observes the covenants on her part in the deed contained; and (in the absence of an express stipulation therein) she will not forfeit her allowance even by the commission of adultery (*k*). It is to be observed, however, that though the law allows provision to be made for a separation already determined on, yet it will not sanction any agreement, the effect of which is to provide for the contingency of a *future* separation at the pleasure of the parties; because this (it has been justly considered) has a tendency to promote that very event (*l*). A separation deed (so far as

(*f*) *Westmeath* v. *Salisbury* (1820), 5 Bli. (N.S.) 339; *Westmeath* v. *Westmeath* (1830), 1 Dow. & Ll. 519; *Hamilton* v. *Hector* (1872), L. R. 13 Eq. 511; *Charlesworth* v. *Holt* (1873), L. R. 9 Exch. 38; *Hunt* v. *Hunt* (1861), 4 D. F. & J. 221; *Wilson* v. *Wilson* (1854), 1 H. L. C. 538.

(*g*) *M'Gregor* v. *M'Gregor* (1888), 21 Q. B. D. 424.

(*h*) *Fearon* v. *Earl of Aylesford* (1884), 14 Q. B. D. 792.

(*i*) *Clark* v. *Clark* (1885), 10 P. D. 188; *Tress* v. *Tress* (1887), 12 P. D. 128.

(*k*) *Sweet* v. *Sweet*, [1895] 1 Q. B. 12.

(*l*) *Hindley* v. *Marquis of Westmeath* (1827), 6 B. & C. 200; *Cocksedge* v. *Cocksedge* (1844), 14 Sim. 244; *Cartwright* v. *Cartwright* (1853), 3 D. M. & G. 982.

it is a separation deed and nothing more) is invariably avoided by a subsequent reconciliation (*m*); but this avoidance would not follow as regards particular terms in respect of which the deed was expressed, or was clearly intended, to have a continuing operation after the reconciliation (*n*). And the avoidance, even in the case of the ordinary separation deed, has no relation back (*o*). It must always be remembered, that a married woman, though thus voluntarily separated from her husband, is not thereby divested, as regards her position toward third parties or otherwise, of the condition of coverture (*p*).

III. *The mode of the dissolution of the relation of husband and wife.*—The relation of husband and wife may, however, be actually dissolved either by death or by divorce. Before the Matrimonial Causes Act, 1857 (*q*), there were two kinds of divorce obtainable by suit in the Ecclesiastical Courts; the one *à mensâ et thoro*, and the other *à vinculo matrimonii*. [Divorce *à mensâ et thoro*, or separation from bed and board, was pronounced in cases where, there having been no illegality in the union at its commencement, yet from some supervenient cause it became improper for the parties to live together; as for the cause of intolerable cruelty in the husband, adultery in either of the parties, and in some few other cases mentioned in the books (*r*). But this species of divorce was never granted on the prayer of the husband on the ground of *adultery*, if the wife recriminated and proved that he also had been unfaithful to the marriage vow; or if it appeared that, after knowledge of her

(*m*) *Nicol* v. *Nicol* (1886), 30 Ch. D. 143; 31 Ch. D. 524; but see *Rowell* v. *Rowell*, [1900] 1 Q. B. 9.

(*n*) *Wilson* v. *Mushett* (1832), 3 B. & Ad. 743; *Negus* v. *Forster* (1882), 46 L. T. 675; *Nicol* v. *Nicol*, *supra*.

(*o*) *Crouch* v. *Waller* (1859), 4 De G. & Jo. 302.

(*p*) *Marshall* v. *Rutton* (1800), 8 T. R. 545.

(*q*) 20 & 21 Vict. c. 85.

(*r*) *Evans* v. *Evans* (1790), 1 Hagg. Const. 36.

[adultery, he had cohabited with her or otherwise condoned her offence (*s*). The sentence for this divorce, though it effected a judicial separation, did not bastardize the issue of the marriage, or enable either of the parties to contract a fresh union ; but the wife, if the innocent party, generally became entitled to *alimony*, that is, an allowance for her support out of her husband's estate to an amount settled at the discretion of the judge on a consideration of all the circumstances of the case, and usually proportioned to the rank, quality, and means of the parties. But no alimony was allowed to the wife if the divorce was on the ground of her adultery, or if she already had from other sources a sufficient income (*t*).

Divorce *à vinculo* was a declaration by the Ecclesiastical Court that the marriage was a nullity, as having been absolutely unlawful from the beginning ; and it separated the parties *pro salute animarum* (*u*), bastardized the issue (*x*), and enabled the parties severally to contract another marriage at their pleasure (*a*). This particular species of divorce was never granted for any cause arising subsequently to the marriage, not even for adultery itself (*b*). For the canon law regarded the nuptial tie as sacred, and in that regard went even beyond the divine revealed law, which expressly assigns incontinence as a cause (and indeed the only cause) why a man may lawfully put away his wife and marry another (*c*).] But though divorce *à vinculo* for adultery could not, prior to the Matrimonial Causes Act, 1857, be obtained in the regular course of law, either in the ecclesiastical or in the secular courts, yet it was very frequently granted by a private Act of Parliament, it having become the practice of the legislature to exercise its paramount authority in this

(*s*) 1 Ought. 317 ; Burn, *Eccl. Law*, *Marriage*, xi.

(*t*) Cowell, tit. *Alimony*.

(*u*) 1 Bl. Com. 440.

(*x*) *Ibid.* ; Co. Litt. 235.

(*a*) *Stephens* v. *Totty* (1603), Moore, 665, 683 ; Cro. Eliz. 908.

(*b*) Bac. Ab. *Marriage*, 3 E. 3 ; *Foliambe's Case* (1603), 3 Salk. 138.

(*c*) Matt. xix. 9.

manner, by way of extraordinary relief to a husband thus injured; but *semble*, not to a wife.

By the Matrimonial Causes Act, 1857, however, and the subsequent statutes passed for its amendment, or incidentally affecting its provisions, not only has the jurisdiction of the ecclesiastical courts in causes matrimonial been taken from them, and been transferred to the new court created by that Act (*d*), and thence transferred to the Probate, Divorce and Admiralty Division of the High Court of Justice under the Judicature Act, 1873; but many novel provisions have been introduced into the law of divorce itself. The main effect of these provisions may be summarily stated as follows.

1. A *judicial separation* (in lieu of the divorce *à mensâ et thoro*) may now be decreed, on the petition of either husband or wife; and this decree has all the effect that belonged to the old divorce *à mensâ et thoro* (*e*). A judicial separation may be decreed on the ground of adultery, or cruelty, or on the ground of desertion without cause for two years and upwards on the part of either husband or wife (*f*); and, during the continuance of the decree, the wife acquires, as to property and for many other purposes, the condition of a feme sole (*g*).

2. A *divorce* or dissolution of the marriage (corresponding with the old divorce *à vinculo matrimonii*) may also now be obtained, on the petition of either husband or wife (*h*). When the husband is the petitioner, it may be on the ground that since the marriage the wife has been guilty of adultery; but where *she* is the petitioner, it may

(*d*) 20 & 21 Vict. c. 85, ss. 2, 6.

(*e*) Sect. 7.

(*f*) Sect. 16. A decree will be refused to a petitioner who has been guilty of a matrimonial offence, other than desertion (*Otway* v. *Otway* (1888), 13 P. D. 141; *Duplany* v. *Duplany*, [1892] P. 53; *Synge* v. *Synge*, [1900] P. 180).

(*g*) Sects. 25, 26; see above, p. 312.

(*h*) A private Act may still be necessary under special circumstances, as where the parties are domiciled in Ireland. See *Joynt's Divorce Bill* (1888), 13 A. C. 741; and Whitaker's Divorce Act, 1894.

only be on the ground that he has since the marriage been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of unnatural crime, or of adultery coupled with such cruelty as would (without adultery) have formerly entitled her to a divorce *à mensâ et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards (*i*). But no divorce can be decreed, if the petitioner (whether husband or wife) has been accessory to, or has connived at, or has condoned, the adultery, or if the petition is presented or prosecuted by collusion (*k*). And the court is not *bound* to decree the divorce, if the petitioner has been guilty of adultery during the marriage, or of cruelty, or of desertion or wilful separation, or of such wilful neglect or misconduct as has conduced to the adultery, or if there has been unreasonable delay in presenting the petition (*l*).

3. Every decree for a divorce is, in the first instance, a decree *nisi*, to be made absolute after the expiration of such a period (not less than six months) as by general or special order is from time to time directed (*m*). At the expiration of that time, the petitioner (but not the respondent) may apply to have the decree *nisi* made absolute (*n*). During this interval, any person may show cause why the decree should not be made absolute, either by reason of collusion or of some material facts not brought forward at the hearing of the original petition; and, on cause being so shown, the case is dealt with, either by making the decree *nisi* absolute, or by reversing that decree, or by requiring further inquiry, or otherwise ordering as justice may require (*o*). The King's Proctor is the official specially charged with intervening, in cases in which the process of the court is being used for improper purposes.

(*i*) 20 & 21 Vict. c. 85, s. 27.
(*k*) Sect. 30.
(*l*) Sect. 31.
(*m*) Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 3.
(*n*) *Ousey* v. *Ousey* (1875), 1 P. D. 56.
(*o*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7.

4. On a decree for dissolution of marriage, the appeal is first to the Court of Appeal; and thereafter there may (in certain cases) be an appeal to the House of Lords, within one calendar month if the House of Lords is then sitting, and otherwise within one fortnight after the House next sits (*p*).

5. When a marriage is dissolved, it is lawful for either party to marry again, as if the prior marriage had been dissolved by death (*q*). But the marriage is regarded as dissolved only as from the date of the decree absolute (*r*).

6. On a decree for judicial separation on the wife's petition, or on a decree for dissolution of the marriage, an order may be made assigning alimony to the wife, even in cases where she has been guilty of adultery (*s*), and providing for the custody, maintenance, and education of the children (*t*). And on a decree for divorce, or judicial separation on the ground of adultery in a wife entitled to any property, an order may be made providing for a portion of such property being settled upon the innocent party and the children of the marriage (*u*).

7. After a final decree for the dissolution of a marriage, a supplementary inquiry may also take place into the existence of any ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree; and on such inquiry, such orders may be made as shall seem fit, with reference to the application of the whole or a portion of the property settled, for the benefit

(*p*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9, modifying the Divorce Amendment Act, 1868 (31 & 32 Vict. c. 77), s. 3; *Clearer* v. *Clearer* (1884), L. R. 9 App. Ca. 631.

(*q*) 20 & 21 Vict. c. 85, s. 57.

(*r*) *Norman* v. *Villars* (1877), 2 Ex. D. 359; *Hulse* v. *Hulse* (1871), L. R. 2 P. & D. 259. See, however, *Prole* v. *Soady* (1868), L. R. 3 Ch. App. 220.

(*s*) 20 & 21 Vict. c. 85, ss. 17, 32; *Ashcroft* v. *Ashcroft*, [1902] P. 272.

(*t*) Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 4.

(*u*) 20 & 21 Vict. c. 85, s. 45; 23 & 24 Vict. c. 144, s. 6. (See *Gladstone* v. *Gladstone* (1875), 1 P. D. 442.)

either of the children of the marriage, or of the parties whose marriage is dissolved (*x*). The court may exercise this power, although there are no children of the marriage (*y*).

8. A decree of *nullity of marriage* may also be obtained on any ground which would formerly have justified a divorce *à vinculo* ; and every such decree is also a decree *nisi* in the first instance (*z*). The like orders touching the settled property of the parties, and the maintenance and custody of the children if any, may, in the case of this decree, be made as in the case of a decree for divorce (*a*).

9. Where the King's Proctor, or any other person, intervenes or shows cause against the rule *nisi* for a divorce or for a judgment of nullity, such order may be made as to the costs thereby occasioned as shall seem just (*b*).

(*x*) 22 & 23 Vict. c. 61, s. 5 ; *Thomson* v. *Thomson*, [1896] P. 263 ; *Allcard* v. *Walker*, [1896] 2 Ch. 369.

(*y*) Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3.

(*z*) 20 & 21 Vict. c. 85, ss. 6, 10, 22, 35, 41 ; 23 & 24 Vict. c. 144, s. 7 ; 36 & 37 Vict. c. 31.

(*a*) 20 & 21 Vict. c. 85, s. 35 ; 22 & 23 Vict. c. 61, ss. 4, 5 ; 41 & 42 Vict. c. 19, s. 3 ; *A.* v. *M.* (1885), 10 P. D. 178 ; *Langworthy* v. *Langworthy* (1886), 11 P. D. 85 ; *Dormer* v. *Ward*, [1900] P. 20.

(*b*) 41 & 42 Vict. c. 19, s. 2.

CHAPTER III.

OF PARENT AND CHILD.

THE relation of parent and child leads us to consider, First, the law of legitimacy,—Secondly, the reciprocal duties and rights between parents and their legitimate offspring,—and Thirdly, the rights and incapacities of illegitimate children (otherwise called bastards) (*a*).

I. A legitimate child is commonly described as a child born in wedlock; but, more accurately, he is a child between whose parents the relation of marriage subsisted either at the time when he was begotten, or at the time when he was born, or at some intervening period (*b*). For a child begotten of parents married at the time, or married afterwards (but before he was born) is legitimate, though in consequence of the death of one of them, or of their divorce, the marriage may have been dissolved before he was born; and the case is the same with a child born of parents married at the time of his birth, though they were unmarried when he was begotten. Our law makes it an indispensable condition, that the parents should in every case intermarry at some period before the child's birth (*c*), differing in this respect from the civil and canon laws, according to which it was sufficient, if the parents should intermarry even after the birth (*d*).

(*a*) Co. Litt. by Butler, 243 b, n. (2).

(*b*) Co. Litt. 7 b, 244 a; 1 Bl. Com. 446; *Doe* d. *Birtwhistle* v. *Vardill* (1840), 6 Bing. N. C. 385; *cf. Gardner* v. *Gardner* (1877), L. R. 2 App. Ca. 723.

(*c*) *Doe* d. *Birtwhistle* v. *Vardill* (1840), 6 Bing. N. C. 385.

(*d*) Co. Litt. by Butler, 245 a, n. (1).

What has been hitherto said supposes, it will be observed, the true parentage in each case to be established; but that is a point which, even as regards the ostensible issue of married persons, the law permits (although with reluctance and under severe restrictions) to be brought into controversy. For if the husband be out of the kingdom of England, or, as the law somewhat loosely phrases it, *extra quatuor maria*, for above nine months, so that no access to his wife can be presumed, her issue begotten during that period shall be bastards (*e*); and (contrary to what was at one time supposed to be the law) (*f*) children born during marriage may also now be proved bastards by other evidence, *e.g.*, by proof of the impotence of the husband, or by proof that the husband and wife had no opportunity, though both within the realm, of sexual intercourse within such period as is consistent with their being the parents (*g*), or even by proof of circumstances tending strongly to the inference that no such intercourse in fact took place (*h*). But except where evidence is given of facts sufficient to disprove sexual intercourse, the law always presumes in favour of the legitimacy of a child born to the wife during the marriage (*i*). Upon the same principle, legitimacy will always be presumed (subject to the same exception) with respect to children born after the coverture has ceased by reason of the husband's death, unless the birth takes place so long afterwards that the child clearly could not be begotten by him. What shall be considered as the *ultimum tempus pariendi*, *i.e.*, the extreme period between

(*e*) Co. Litt. 244.

(*f*) *Ibid.*

(*g*) *Hawes* v. *Draeger* (1883), 23 Ch. D. 173; *Glenister* v. *Harding* (1885), 29 Ch. D. 985; *Bowrile* v. *Att.-Gen.* (1887), 12 P. D. 177.

(*h*) *R.* v. *Lubbenham* (1791), 4 T. R. 251; *Banbury Peerage Case* (1811), 1 S. & S. 153; *Morris* v. *Davies* (1836), 5 Cl. & Fin. 163.

(*i*) *R.* v. *Mansfield* (1841), 1 Q. B. 449; *Saye and Sele Peerage* (1848), 1 H. L. C. 507; *Hargrave* v. *Hargrave* (1846), 9 Beav. 552.

the conception and the birth, is a matter of fact which the law leaves to be determined, according to the circumstances of the particular case, and the testimony which persons of experience may give of the course of nature on this subject; but in general, nine calendar months, or forty weeks, has been considered the outside limit (*k*).

[Where a widow is suspected to feign herself with child, in order to produce a supposititious heir, the heir presumptive, or other person who would in default of issue of the widow's late husband be entitled to real estate, may have a writ *de ventre inspiciendo*, to examine whether the widow be with child or not, and if she be, to keep her under proper restraint till delivered (*l*); but if the widow upon due examination be declared not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again on the birth of a child within the forty weeks from the death of the husband (*m*).

If a man dies and his widow soon after marries again, and a child is born within such a time as that by the course of nature he might have been the child of either husband, in this case he is said to be more than ordinarily legitimate; for, when he arrives to years of discretion, he may choose which of the fathers he pleases (*n*). To prevent this inconvenience, the civil law ordained that no widow should marry *intra annum luctûs* (*o*), a rule which obtained so early as the reign of Augustus, if not of Romulus (*p*). And the same constitution was probably handed down to our early ancestors from the Romans during their stay in this island; for we find it established under the Saxon

(*k*) Co. Litt. by Harg. 123 b, n. (1); *Alsop* v. *Bowtrell* (1620), Cro. Jac. 541; *Bosvile* v. *Att.-Gen.*, *ubi sup.*; *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282.

(*l*) Bract. l. 2, ch. 32; *Anscough's Case* (1731), 2 P. Wms. 591; *Ex parte Wallop* (1792), 4 Bro. C. C. 90; *Re Blakemore* (1845), 14 L. J. Ch. 336; Co. Litt. by Harg. 8 b, and n. (3); *ib.* 123 b, n. (1).

(*m*) Britton, ch. 66.

(*n*) Co. Litt. 8 a; but see n. (7), by Harg.

(*o*) Cod. 5, 9, 2.

(*p*) Ov. Fast. l. 33—36.

[and Danish governments (*q*).] But although the hasty remarriages of widows are indecent, and (in some instances) have been revolting, there is nothing in our law which prohibits them.

II. [We are next to consider the duties of parents towards, and their powers over their legitimate children; and the reciprocal duties of such children towards their parents.

1. And first, *the duties of the parents.*—These duties principally consist in three particulars, namely, the maintenance of the children, their protection, and their education. For the duty of parents to provide for the maintenance of their children is a principle of natural law (*r*). And as Montesquieu very justly observes (*s*), the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; and the municipal laws of all well-regulated states have taken care therefore to enforce this duty. The Roman civil law, in particular, obliged the parent to provide maintenance for his child (*t*); and it carried this matter so far, that it would not suffer a parent at his death totally to disinherit his child, without expressly giving his reason for so doing (*u*). And if the parent alleged no reason, or a bad one, or a false one, the child might set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty of the parent (*x*), a law which Grotius and others have considered as going too far (*y*).] But certainly our own common law may be said to have gone not far enough; for the obligation at common law of a father to provide for the maintenance of his

(*q*) "*Sit omnis vidua sine marito duodecim menses.*"—Wilk. *Leg. Anglo-Sax.* Ll. Ethel. A.D. 1008; Ll. Canut. ch. 71.

(*r*) Puff. L. of N. l. 4, ch. 11.

(*s*) Sp. L. b. 23, ch. 2

(*t*) Dig. 25, 3, 5.

(*u*) Nov. 115, 3.

(*x*) Inst. ii. 18; Puff. L. 4, ch. 11, s. 7.

(*y*) De J. B. et P. l. 2, ch. 7, n. 3.

children is one which the common law supplies no direct means of enforcing (*z*). For the mere moral obligation upon a father to maintain his child affords no inference of a promise to do so, or to pay for necessaries supplied for the use of the child (*a*). Possibly, however, a father may be liable to repay another for the support of his child, when he has deserted it and left it in a destitute state (*b*).

The deficiencies of the common law in this respect have been in some measure supplied by statute; the Acts relating to the relief of the poor, making it compulsory upon all, whose circumstances enable them to do so, to provide a maintenance for their progeny, when in poverty, of whatever age they may be, and indeed whenever, through infancy, disease, or accident, they are unable to support themselves. The manner in which this obligation is to be performed is thus pointed out by the legislature (*c*). The father and mother, grandfather and grandmother, of any poor person not able to work, are to maintain him or her at their own charges, if of sufficient ability, according as the justices in petty sessions shall direct. The orders of the justices may be enforced in the manner prescribed by the Summary Jurisdiction Act, 1848 (*d*). If a parent *runs away* and leaves his children chargeable to the parish, the churchwardens and overseers, upon obtaining an order of the magistrates for the purpose,

(*z*) *Cooper* v. *Martin* (1803), 4 East, 84; *Mortimore* v. *Wright* (1840), 6 M. & W. 482.

(*a*) *Mortimore* v. *Wright*, *ubi supra*; overruling *Lane* v. *Wilkin* (1837), 6 A. & E. 718.

(*b*) *Urmston* v. *Newcomen* (1836), 4 A. & E. 899.

(*c*) See especially the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 6; 5 Geo. 1, c. 8; Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 26; Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3; Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76); Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 8; Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122); Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), ss. 1, 23.

(*d*) 11 & 12 Vict. c. 43; see 31 & 32 Vict. c. 122, s. 36.

may seize his rents, goods and chattels, and dispose of them towards the required relief (*e*).

Every man is liable to maintain the children (whether legitimate or illegitimate) of his wife born before his marriage with her, as part of his own family, and is chargeable with all poor law relief granted to them, until they attain the age of sixteen, or until the death of the mother (*f*).

By the Married Women's Property Act, 1882 (*g*), a married woman having separate property is made subject to the same liability for the maintenance of her children and grandchildren, as the husband is subject to for the maintenance of her children and grandchildren.

A parent who, although able to do so, neglects or refuses to maintain his family, which thereby becomes chargeable to the parish, may be punished under the Vagrancy Act, 1824 (*h*).

By the Prevention of Cruelty to Children Act, 1894 (*i*), any person over the age of sixteen years who, having the custody of any child under the age of sixteen years, neglects, abandons or exposes such child in a manner likely to cause such child unnecessary suffering, or injury to its health, is guilty of a misdemeanor, and is punishable on conviction on indictment by a maximum fine of 100*l*., or a maximum imprisonment for two years, and on summary conviction by a maximum fine of 25*l*., or maximum imprisonment for six months.

By the Reformatory Schools Act, 1866, and the Industrial Schools Act, 1866 (*k*), in any case in which a child is detained in a certified reformatory or industrial school, the parent or step-parent, or other person liable for his maintenance, if of sufficient ability, is made liable to contribute to his support, maintenance, and training therein, to the

(*e*) 5 Geo. 1, c. 8.
(*f*) 4 & 5 Will. 4, c. 76, s. 57.
(*g*) 45 & 46 Vict. c. 75, s. 21.
(*h*) 5 Geo. 4, c. 83, s. 3.
(*i*) 57 & 58 Vict. c. 41, s. 1.
(*k*) 29 & 30 Vict. c. 117, s. 25; c. 118, s. 39.

extent of five shillings a week, or such lesser sum as shall be directed.

[No person, however, is bound to provide a maintenance for his issue, unless where the children, either through infancy, disease, or accident, are impotent and unable to work; and then he is only obliged to find them in necessaries. For our laws do not compel a father to maintain his children, who are able to maintain themselves; and it is unjust to oblige the parent, against his will, to provide his children with superfluities. Moreover, our laws have made no provision to prevent the disinheriting of children by will, but leave every man's property at his own disposal; though among persons of any rank or fortune, a competence is generally provided by the marriage settlement for younger children, while the bulk of the estate is settled upon the eldest son.

Next to the duty of maintenance is the duty of protection; and a parent may maintain and uphold his children in their lawsuits, without being guilty of the offence of maintaining quarrels (*l*), and he may also justify an assault and battery, in defence of their persons (*m*).

The third duty of parents to their children is to give them an education suitable to their station in life.] Although provision for the education of children has from the earliest times been made by our churches and chapels and by the munificence of wealthy individuals and corporations, yet by reason of the vast increase of the population, the supply (at least of elementary schools) has never outstripped the demand. The matter received the special attention of the Government in the year 1870, when by the Elementary Education Act, 1870 (*n*), very extensive further provision was made for the education of the poorer classes of children, and the school boards constituted by

(*l*) 2 Inst. 564; *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. 1.

(*m*) 1 Hawk. P. C. 131.

(*n*) 33 & 34 Vict. c. 75.

that Act obtained power to make bylaws requiring parents to cause their children to attend school. The duty of procuring efficient elementary instruction for their children was first imposed on parents generally by the Elementary Education Act, 1876 (*o*). Of these statutes, and of those by which they have been amended, we shall give a more particular account hereafter (*p*).

2. Secondly, *the powers of parents*.—[The power of parents over their children is derived from their duty towards them; and the municipal laws of some nations have given a much larger authority to parents than we find in others. Thus, the antient Roman law gave the father a power of life and death over his children (*q*); and, though the rigour of that law was softened by subsequent enactments (*r*), parents maintained to the last, under the Roman law, a very large and absolute authority. For, with certain exceptions, a son could not acquire any property of his own during the life of his father, all his acquisitions belonging to the father, or at least the profits of them for his life (*s*). And although, under our law, the power of parents is much more moderate, still it is sufficient to keep children in order; and a father may lawfully correct his child, being under age, in a reasonable manner, for that is for his benefit (*t*). The father may also delegate part of his parental authority to a tutor or schoolmaster; and the schoolmaster is then *in loco parentis*, and has such power of correction, as may be necessary to answer the purposes for which he is employed.

A father is also, generally speaking, guardian of the property of his infant child; and, if such child has any real estate, the father is entitled to take charge of it, and to receive the rents and profits thereof during the minority, subject to a liability to account for them on the child's attaining full age.] But a father has no such right in

(*o*) 39 & 40 Vict. c. 79, s. 4.
(*p*) *Vide post*, bk. IV. pt. III.
(*q*) Dig. 28, 2, 11; Cod. 8, 47, 10.
(*r*) Dig. 48, 9, 5.
(*s*) Inst Lib. ii. tit. 9, 1.
(*t*) 1 Hawk. P. C. 130.

respect of his child's personal estate: he cannot, therefore, give a good discharge for a legacy due to the latter (*u*), except under an order of the court, or by the direction of the testator.

The father is also entitled, as the general rule, to the possession and custody of the person of his child; and it is only in very extreme cases that he will be deprived of that custody (*x*). And in general, if the possession or custody be withheld from him, he may regain it by writ of *habeas corpus*, or by an application to the Chancery Division of the High Court of Justice (*y*); but the court may now, in its discretion, refuse, but only on just grounds, to grant the writ or to make the order (*a*). The right of the father, mother, or other guardian, to the possession of their children, is also, to a certain extent, protected by the provisions of the criminal law, under which it is made highly penal, either by force or fraud, to take or entice away, or to detain, any child under the age of fourteen, with intent to deprive its parent, guardian, or other person having lawful charge of such child, of the possession thereof; or, with such intent, to receive or harbour it, knowing the child to have been so taken or detained; or unlawfully to take, or cause to be taken, any unmarried girl, under the age of sixteen, out of the possession and against the will of her father or mother, or other person having lawful care or charge of her (*b*). Moreover, the assent of the father to the marriage of his child, if under age, and not being a widower or widow, is also requisite under the Marriage Acts, 1823 and 1836; as was explained at large in the previous chapter (*c*).

(*u*) *Dagley* v. *Tolferry* (1715), 1 P. Wms. 285.

(*x*) *Willesley* v. *Beaufort* (1827), 2 Russ. 21; *Re Agar Ellis* (1883), 24 C. D. 317; *Skinner* v. *Skinner* (1888), 13 P. D. 90; but see now Guardianship of Infants Act, 1886, s. 5, *infra*, p. 340.

(*y*) *Earl of Westmeath's Case* (1822), Jacob, 251; *Ex parte Witte* (1853), 13 C. B. 680; *Re Newton*, [1896] 1 Ch. 740.

(*a*) Custody of Children Act, 1891 (54 & 55 Vict. c. 3).

(*b*) *Vide post*, bk. VI.

(*c*) *Vide supra*, pp. 293, 297.

[The legal power of a father over the persons or property of his children extends not in any case beyond the age of twenty-one ; for they are then enfranchised by arriving at years of discretion. But until that age arrives, this empire of the father continues even after the father's death ; for he may by deed or will appoint a guardian to such of his *unmarried* children as are infants] (*d*).

With respect to the mother, she had not at common law, as against the father, any legal power over the child in the father's lifetime (*e*). But now, under the Guardianship of Infants Act, 1886 (*f*), the Court may, on the application of the mother, make such order as it may think fit regarding the custody of her infant child, and the access thereto of either parent, having regard to the welfare of the infant, and to the conduct and the wishes of either parent ; and upon such application the Court may override entirely the common law rights of the father (*g*). After the father's death, the mother was always considered to be entitled to the custody of her children until twenty-one, subject, however, to the power of the guardians, if any, appointed by the father's will (*h*) ; and by the Marriage Acts, 1823 and 1836 (*i*), where there was no other guardian appointed, the widow, while she remained unmarried, stood in the father's place, after his death, as to the consent required to the child's marriage during minority. She could not, however, have appointed a guardian by will, as she was not mentioned in the statute of Charles the Second, by virtue of which alone the father enjoyed that privilege (*k*) ; though, if she had purported to appoint such a guardian, the Court would have had regard to her wishes (*l*). But it has now been provided

(*d*) 12 Car. 2, c. 24.

(*e*) *Re Agar Ellis* (1883), 24 C. D. 317 ; *Re A. & B.*, [1897] 1 Ch. 786.

(*f*) 49 & 50 Vict. c. 27, s. 5.

(*g*) *Re A. & B.*, [1897] 1 Ch. 786.

(*h*) *Talbot* v. *Earl of Shrewsbury* (1839), 4 My. & Cr. 672.

(*i*) 4 Geo. 4, c. 76 ; 6 & 7 Will. 4, c. 85.

(*k*) *Ex parte Edwards* (1747), 3 Atk. 519.

(*l*) *In re Kaye* (1866), L. R. 1 Ch. 387.

by the Guardianship of Infants Act, 1886 (*m*), s. 3, that the mother may by deed or will appoint a guardian after her own death and the death of the father of the children, to act jointly with the guardian (if any) appointed by the father; and by the same Act (section 2), the mother (if she survive the father) is constituted the guardian of her infant children generally, to act jointly with the guardian (if any) appointed by the father, although if no guardian has been appointed by the father, or the guardians appointed by the father are dead or refuse to act, the Court may associate one or more guardians with her (*n*). By sect. 7 of the same Act, a parent may be declared by the Court which has pronounced a decree for judicial separation or divorce by reason of his or her misconduct, to be unfit to have the custody of the children of the marriage; and in such case the parent so declared unfit will not, upon the death of the other parent, be entitled as of right to the custody or control of such children. It is now well settled, that the mother is the natural guardian of her illegitimate child, though her rights are not identical with those of the father of a legitimate child (*o*).

3. [Thirdly, *the duties of children to their parents.*—These are duties which arise from natural justice. For to those who gave us existence, we naturally owe subjection, honour, and reverence; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their own age; and they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by their offspring. In this country, however, the law has not deemed it necessary to make much provision on the subject of the filial obligations; it is, nevertheless, a provision of our law, that a child is justified in defending the person and maintaining the cause or suit of his parent, just as we have seen that a parent is justified in performing the

(*m*) 49 & 50 Vict. c. 27.

(*n*) *Ibid.* s. 2, and see *Re Scanlan* (1888), 40 Ch. D. 200.

(*o*) *R.* v. *Nash* (1883), 10 Q. B. D. 454; *Barnardo* v. *McHugh*, [1891] A. C. 388.

[same duties for his child.] And by the Acts relating to the relief of the poor, the children of any old, blind, lame, impotent, or other poor person not able to work, if of sufficient ability, are required, at their own charges, to relieve and maintain him or her, in the manner and according to the rate which the justices of the peace at their petty sessions shall direct (*p*).

III. We are next to consider the case of illegitimate children or bastards. [By our law, the duty of parents with regard to these is principally that of maintenance; for, though bastards are not looked upon as children for any civil purposes, yet the support of the offspring by the parent is a matter of natural obligation (*q*).] And the method in which the English law provides maintenance for an illegitimate child, during its infancy, is as follows. The mother is entitled to the custody of the child (as it would seem) in preference to the putative father (*r*), and is bound to maintain it until the child attains the age of sixteen, or (being a female) marries (*s*). In the event of the mother's marriage, the same liability attaches to her husband, but ceases with her death (*t*). If the mother, being of sufficient ability to maintain her bastard, neglects that duty, so that it becomes chargeable to the parish, she is made liable, by the Poor Law Amendment Act, 1844 (*u*), to be punished as an idle and disorderly person under the Vagrancy Act, 1824 (*x*). If, on the other hand, she be not of sufficient ability, the law affords her the means of relieving herself from her liability as its mother, and of compelling the putative father to supply a fund for its maintenance. For by the Bastardy Laws Amendment Acts,

(*p*) *Vide supra*, p. 335, and *post*, bk. IV. pt. III.; 43 Eliz. c. 2, s. 6; 31 & 32 Vict. c. 122.

(*q*) *Cf.* Nov 89, c. 15.

(*r*) *Ex parte Anne Knee* (1804), 1 B. & P. (N.S.) 148; *R.* v. *Nash*, (1883), 10 Q. B. D. 454.

(*s*) 4 & 5 Will. 4, c. 76, s. 71.

(*t*) *Ibid.*, s. 57.

(*u*) 7 & 8 Vict. c. 101, s. 6.

(*x*) 5 Geo. 4, c. 83.

1872 and 1873 (*y*), a single woman may, either before the birth of her bastard child, or at any time within twelve months afterwards, make application to a justice of the peace, charging a person by name as the father of such child; and where the alleged father has within twelve months next after its birth paid money for the maintenance of the child, such application may be made at any subsequent period whatever without limitation in regard to time. Upon such application the justice issues his summons to the party charged to appear at a petty sessions (*a*). On the hearing of the summons, the evidence on both sides is heard; and if the evidence of the mother as to the paternity of the child be corroborated in some material particular (*b*) by other testimony to the satisfaction of the justices in petty sessions, the man charged may be adjudged to be the "putative father" of the child in question. And in that case the justices or magistrate may (if they or he see fit under the circumstances) make an order on him, called a bastardy, affiliation, or maintenance order, for the payment to the mother, or to some other person to be appointed for the custody of the child in the case of her death, insanity, or imprisonment, of a weekly sum of money for its maintenance and education. Such an order remains in force until the child dies or attains the age of thirteen, or (occasionally) the age of sixteen (*c*), and (unless the justices otherwise order) continues enforceable after the mother's marriage (*d*); and the father's liability

(*y*) 35 & 36 Vict. c. 65; 36 & 37 Vict. c. 9. Similar provisions are contained in ss. 2, 3 (now repealed) of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101).

(*a*) In London a single police magistrate has the same powers as the justices at petty sessions (Bastardy Act, 1845 (8 & 9 Vict. c. 10), s. 9).

(*b*) As to what amounts to corroboration, see *Cole* v. *Manning* (1877), 2 Q. B. D. 611.

(*c*) 35 & 36 Vict. c. 65, s. 5; *Pearson* v. *Heys* (1881), 7 Q. B. D. 260.

(*d*) *Sotheron* v. *Scott* (1881), 6 Q. B. D. 518; *Williams* v. *Davies* (1883), 11 Q. B. D. 74.

under the order (as we have seen in a former chapter) is not released by any order of discharge in bankruptcy (*e*). The father is, however, entitled to appeal to quarter sessions from the order, upon entering into his recognizance to try the appeal and to pay such costs as shall be adjudged thereon, and upon otherwise complying with the prescribed conditions and regulations (*f*); and on the hearing of such appeal, the case is to be tried *de novo*.

Bastards, although their maintenance during childhood is thus provided for, labour under many disadvantages. For a bastard is, for legal purposes, *filius nullius* or *filius populi* (*g*); and hence is not entitled by law either to the name of his mother or to that of his father (*h*), although he may (if he choose) assume the surname of either, or in fact any other surname (*i*). A bastard cannot take property by the mere description of *child* of his putative parent, until he has in some way acquired the reputation of standing in that relation to him. In a will the term children *primâ facie* means legitimate children, and an illegitimate child will not be permitted to take. But this rule is departed from where, from the circumstances or from the true construction of the will, it appears that the testator must have intended illegitimate children to take (*k*). With regard to the acquisition of property by inheritance, or under the Statute of Distribution, he is in a different position from others; for he can neither himself be heir or next of kin to any one, nor have any heir or next of kin except the issue of his own body. If, therefore, a bastard purchase land, though he may take in fee, so far as the

(*e*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 10.

(*f*) 7 & 8 Vict. c. 101, s. 4; Summary Jurisdiction Acts, 1879 and 1884 (42 & 43 Vict. c. 49, ss. 31, 32; 47 & 48 Vict. c. 43); *R.* v. *Shingler* (1886), 17 Q. B. D. 49.

(*g*) Fortesc. *de Leg.* ch. 4.

(*h*) Co. Litt. 3 b; *Wilkinson* v. *Adam* (1812), 1 Ves. & B. 452.

(*i*) Falconer, *Surnames*, 1862, and Supplement, 1863; *Doe* dem. *Luscomb* v. *Yates* (1822), 5 B. & Ald. 544.

(*k*) *Hill* v. *Crook* (1873), L. R. 6 H. L. 265; *Re Walker*, [1897] 2 Ch. 238.

power of disposing of the same to others is concerned, it is not, while it remains in his own seisin, a fee in the sense of being descendible to heirs generally, but its descent is confined to the heirs of his own body (*l*). If he die seised of such estate without having devised it, and without leaving any such heirs, it will escheat to the Crown or other lord of the fee. The Crown or lord respectively have, under the Intestates' Estates Act, 1884, a similar right to the undisposed of proceeds of sale of real estate directed by the will to be sold (*m*). The Crown is entitled also to the beneficial administration of the personal estate of a bastard who dies intestate and without issue, or any widow surviving him. The claim of the Crown to the real or personal estate of a bastard is not, however, strictly enforced; for the Crown's right will in general, upon the due petition in that behalf, be transferred to the nearest member of the bastard's reputed family (*n*).

There are some other points also, as to which a bastard is peculiarly circumstanced. Thus, he does not follow (as legitimate children do) his father's place of parochial settlement under the laws relating to the poor; but his primary settlement, if he was born before the 14th August, 1834, is in the parish where he was born (*o*); if he was born after that date, he takes the settlement of his mother till he attains the age of sixteen, and retains the settlement so taken until he acquires another (*p*). On the other hand, to authorize his marriage under twenty-one, the consent of his father or mother is not required (*q*); but a license to marry may be granted to him, upon oath made that there is no person authorised to give such

(*l*) *Idle* v. *Cooke* (1705), Ld. Raym. 1152; 1 Prest. *Est.* 468.

(*m*) *Att.-Gen.* v. *Anderson*, [1896] 2 Ch. 596.

(*n*) Toller, *Ex.* 107; 59 Geo. 3, c. 94; 47 & 48 Vict. c. 71.

(*o*) *Hardy's Case* (1697), Salk. 427.

(*p*) Poor Law Amendment Act, 1834, s. 71; Divided Parishes and Poor Law Amendment Act, 1876, s. 35.

(*q*) *Priestley* v. *Hughes* (1809), 11 East, 1.

consent (*r*). And though a father may in general by deed or will appoint a guardian for his infant child, he has no such privilege if the child be illegitimate.

On the other hand, the laws relative to incest, and to marriages within the prohibited degrees of consanguinity or affinity, apply to a bastard with equal force as to those who are born in wedlock; the principle of his being *nullius filius* having no effect in these particulars (*s*). And it may be stated generally, that, except in the several points above enumerated, the legal position of a bastard is the same with that of another man; and he is capable of being, by the transcendent power of Parliament, made legitimate for all purposes, even that of inheriting land, as was done by a statute of Richard II. in the case of John of Gaunt's children (*t*).

(*r*) Marriage Act, 1823, s. 14; Marriage Act, 1836, s. 12.

(*s*) *R.* v. *Chafin* (1702), 3 Salk. 66; *Hains* v. *Jessell* (1696), 1 Ld. Raym. 68; *The Queen* v. *Brighton* (1861), 1 B. & S. 447, 453.

(*t*) 4 Inst. 36.

CHAPTER IV.

OF GUARDIAN AND WARD.

THE fourth private relation is that of guardian and ward. And we shall consider, first, the legal condition of the ward; next, the different species of guardians; and, lastly, the rights and duties of guardians.

I. *The legal condition of the ward.* — Infancy or minority is the period of life, whether in males or females, which precedes the age of twenty-one, an age at which they are competent for all that the law requires them to do, and which is therefore designated as *full age* (*a*). Full age is gained on the day preceding the twenty-first anniversary of the infant's birth; and as in the computation of time the law for this purpose allows no fraction of a day, a child born on the evening of the 1st January, is of age on the morning of the 31st December in the twenty-first year afterwards (*b*).

[An infant has various special privileges, and is subject to various incapacities. He cannot be sued but under the protection, and with the benefit of the defence of his guardian (*c*), that is, of his guardian *ad litem*, appointed by the court for the purpose of the particular action; and, on the other hand, he may sue either by a guardian *ad litem* appointed by the court, or (what is much the most usual course) by his next friend or *prochein amy*, that is,

(*a*) 1 Hale, P. C. 28; Co. Litt. 171 b.

(*b*) *Howard's Case* (1700), 2 Salk. 625; 1 Ld. Raym. 480; *Fitz-Hugh* v. *Dennington* (1704), 2 Ld. Raym. 1096.

(*c*) Co. Litt. 135 b; *Castledine* v. *Mundy* (1832), 4 B. & Ad. 90.

[by any friend willing to undertake his cause (*d*).] It is also a privilege belonging to infants, that they lose nothing during their minority by non-claim of their rights; for though persons of full age are barred by their omission to take any step towards the recovery of their rights within a certain period of time, it is otherwise with respect to infants, who are not bound to claim upon a title or cause of action which first accrues to them while they are under age, until after the expiration of a period commencing from their attainment of majority (*e*). It is also laid down generally, that an infant can neither make any conveyance or purchase that will bind him (*f*); nor enter into a binding contract; nor be sworn as a juror (*g*); nor sit and vote in parliament (*h*); nor hold any public office of pecuniary trust, or of a judicial kind (*i*); nor, in short, do any legal act. To this general incapacity, there are exceptions; and it will be proper here to advert to some of these. Thus, although an infant is generally under disability where he acts on his own account, yet he is under none when acting as *agent* for another person (*k*); for the person by whom he is appointed agent is (for that purpose) the best judge of his ability. [So an infant who has an advowson, that is, the perpetual right to present to a benefice, may present to the benefice when it becomes void (*l*). For the law in this case dispenses with one rule, in order to maintain another of far greater consequence; permitting the infant to present a clerk, who, if unfit, may be rejected by the bishop, rather than

(*d*) Co. Litt. *ubi sup.*; *Collins* v. *Brook* (1859), 4 H. & N. 270.

(*e*) Co. Litt. 380 b; Limitation Act, 1623, s. 7; Real Property Limitation Act, 1833, s. 16; Real Property Limitation Act, 1874, s. 3; Civil Procedure Act, 1833, s. 4.

(*f*) Co. Litt. 171 b.

(*g*) Bac. Ab. *Infancy*, E.; 6 Geo. 4, c. 50, s. 1.

(*h*) Whitelock, ch. 50; 4 Inst. 47; 7 & 8 Will. 3, c. 25.

(*i*) *Claridge* v. *Evelyn* (1821), 5 B. & Ald. 81; Bac. *ubi sup.*

(*k*) Co. Litt. 52 a; *Re d'Angibau* (1880), 15 Ch. D. 228, 246.

(*l*) Co. Litt. 89 a, note (1); 172 b.

[suffer the church to be unserved, or the infant's right to be barred by lapse.] But except in the case of a guardian in socage, the infant's right of presentation will be exercised by his guardian (*m*). Where the guardian is guardian in socage, the guardian cannot present, but the infant's discretion will be controlled by the court (*n*). So an infant may be sworn as a witness, however young, provided he understands the nature of an oath (*o*) ; and in proceedings under the Criminal Law Amendment Act, 1885, and the Prevention of Cruelty to Children Act, 1894, the evidence of a child of tender years, who in the opinion of the court does not understand the nature of an oath, may, subject to the provisions of those Acts, be admitted. At the age of twelve an infant may also take the oath of allegiance (*p*) ; and at the age of fourteen, if a male, or of twelve, if a female, may consent to marriage. Again, though infants cannot, as a general rule, so aliene or purchase estates but that the transaction shall be voidable at their pleasure, on their attainment of full age (*q*), yet they may make a feoffment at the age of fifteen of their gavelkind lands, provided that the feoffment is made upon an adequate consideration (*r*) ; and by the Infant Settlements Act, 1855 (*s*), any male infant of twenty years, or female infant of seventeen years, may, with the sanction of the court, make a valid and binding settlement either of real or personal estate, in contemplation of his or her marriage.

Again, although, as a general rule, an infant cannot enter into a contract that shall bind him, yet there are many exceptions to the rule. Regarding the contracts of infants, the law may be said to be as follows: (1)

(*m*) *Hearle* v. *Greenbank* (1749), 1 Ves. sen. 298, 304.

(*n*) 3 Inst. 156 ; *Arthington* v. *Coverley* (1732), 2 Eq. Ca. Ab. 518.

(*o*) Hale, P. C. 278.

(*p*) Co. Litt. 172 b.

(*q*) *Ibid.* 2 b ; *Zouch* v. *Parsons* (1765), 3 Burr. 1794.

(*r*) Bac. IV. p. 49 (7th ed.) ; *In re Mankell and Goldfinch*, [1895] 2 Ch. 525.

(*s*) 18 & 19 Vict. c. 43.

Contracts which are manifestly for the infant's benefit are valid (*t*); (2) Contracts not manifestly for the infant's benefit were, before the passing of the Infants' Relief Act, voidable at his option (*u*). It was sometimes added that contracts manifestly to the infant's prejudice were void; but in the cases cited to establish this view, it appears that the word "void" was used in the sense of voidable, for it would clearly be unjust that the infant himself should not be able to sue upon the contract (*x*). Thus, an infant's contract to pay a penalty was not binding upon him (*y*); and his contract of service for a fixed period was unenforceable against him, where it contained a stipulation enabling the master to stop the work at pleasure, and during such period of suspension to stop also the wages (*z*). But an infant may apprentice himself in the ordinary form of such a contract, that being manifestly for his benefit (*a*); and an infant was held bound by a clause in a contract of employment, whereby he agreed to forego the rights given by the Employers' Liability Act, 1880, the contract as a whole being for the infant's benefit (*b*). An infant may bind himself to pay for his meat, drink, apparel, physic, and other such necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards (*c*). As a general rule all an infant's contracts for things called "necessaries" supplied to him are binding upon him; but he is liable only to pay a reasonable price therefor (*d*). In determining what shall be necessaries, regard is to be had

(*t*) *Clements* v. *London and North Western Railway Co.*, [1894] 2 Q. B. 482.

(*u*) *Warwick* v. *Bruce* (1813), 6 Taunt. 118.

(*x*) *R.* v. *Lord* (1848), 12 Q. B. 757; see Pollock, *Contracts*, 7th ed., p. 56.

(*y*) Co. Litt. 172 a.

(*z*) *R.* v. *Lord*, *ubi sup.*: *Mea-kin* v. *Morris* (1884), 12 Q. B. D. 352.

(*a*) *Wood* v. *Fenwick* (1842), 10 M. & W. 195

(*b*) *Clements* v. *L. & N. W. Ry. Co.*, *ubi sup.*

(*c*) Co. Litt. 172 a.

(*d*) Sale of Goods Act, 1893, s. 2.

in each particular case to the infant's condition in life, and to his actual requirements at the time of the sale and delivery (*e*); and necessaries for him may include also necessaries for his wife (if any), and for his child or children (*f*). But an infant is not liable on his contracts for necessaries if supplied to him while living unmarried under the roof of his parent, by whom his wants of this nature are sufficiently provided for (*g*).

As regards the voidable contracts and dispositions of an infant, the law as it stood before the passing of the Infants' Relief Act, 1874, was, that a contract merely creating an obligation was unenforceable unless and until ratified by him on coming of age; but where the infant had made a disposition of property (such as a settlement), or was subject to an obligation attached to an interest in property (as in the case of a lease or the holding of shares in a company), the infant would be bound, unless he repudiated within a reasonable time after coming of age (*h*).

This statement of the law must now be read subject to the provisions of the Infants' Relief Act, 1874 (*i*), by which it is provided (1) that all contracts by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with them, shall be absolutely void; and (2) that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt (not being for necessaries) contracted during infancy, or upon any ratification made after full age of any promise

(*e*) *Ryder* v. *Wombwell* (1868), L. R. 4 Ex. 32; *Barnes* v. *Toye* (1884), 13 Q. B. D. 410; *Johnston* v. *Marks* (1887), 19 Q. B. D. 509; Sale of Goods Act, 1893, s. 2.

(*f*) *Turner* v. *Trisby* (1719), 1 Str. 168; *cf. Chapple* v. *Cooper* (1844), 13 M. & W. 252.

(*g*) *Dalton* v. *Gibb* (1839), 5 Bing. N. C. 198.

(*h*) *Kettle* v. *Eliot* (1614), Rolle Ab. 1, 731 k.; Cro. Jac. 320; *Evelyn* v. *Chichester* (1765), 3 Burr. 1717; *L. & N. W. Ry. Co.* v. *McMichael* (1850), 5 Ex. 114; *Edwards* v. *Carter*, [1893] A. C. 360.

(*i*) 37 & 38 Vict. c. 62.

or contract made during infancy, whether there shall or shall not be any new consideration for the promise or ratification after full age (*k*). It should be noted that the second section of the Act has no application to cases in which the infant is liable in the absence of a repudiation made within a reasonable time after coming of age (*l*); but applies only to those which before the passing of the Act were unenforceable unless ratified.

But though infants are thus, to a certain extent, exempted from liability for mere breach of contract, the law allows them no such privilege in respect of injuries of any other kind; for not only are they answerable for *crimes* long before their attainment of full age, but an action also may be brought against them to recover damages for their *torts* (being injuries independent of contract), such as trespass, slander, and the like (*m*). But an infant is not liable for a wrong (such as deceit in representing himself to be of full age) which is so closely connected with a contract, that an action for such wrong would be an indirect method of enforcing the contract (*n*).

II. *The different species of guardians.*—The guardianships recognised by our law are of the following varieties:

1. *Guardianship by nature.*—This is said to belong to the father in respect of the person of his heir apparent, or of his heiress presumptive, there being, properly speaking, no other kind of guardianship by nature than this; and the term natural guardian, as applied to the father or mother with reference to all their children, is rather a popular than a technical mode of expression. For when a

(*k*) *Ex parte Kibble* (1875), L. R. 10 Ch. 373; *Coxhead* v. *Mullis* (1878), 3 C. P. D. 439; *Northcote* v. *Doughty* (1879), 4 C. P. D. 385; *Ditcham* v. *Worrall* (1880), 5 C. P. D. 410.

(*l*) *Re Yeoland's Consols* (1888), 58 L. T. 922; *Edwards* v. *Carter*, [1893] A. C. 360.

(*m*) *Defries* v. *Davies* (1835), 1 Bing. N. C. 692; *Burnard* v. *Haggis* (1863), 14 C. B. (N.S.) 45.

(*n*) *Johnston* v. *Pye* (1665), Sid. 258; *Jennings* v. *Rundall* (1799), 8 T. R. 335.

father's right to the person of a child who is not his heir apparent is intended, his guardianship is properly that next to be noticed (*o*). It has been doubted whether, since the abolition of tenures in chivalry, guardianship by nature can exist at all, in the strict sense of the term (*p*).

2. *Guardianship for nurture.*—This is a species of guardianship that applies to all the children, extending to the person only. It belongs to the father, and (at his decease) to the mother; and it lasts both with males and females only to the age of fourteen (*q*). The two species of guardianship above described, as distinguished from the parental right to the control and custody of an infant child, already dealt with in a previous chapter, appear to have no practical importance at the present day.

3. *Guardianship in socage.*—This is a species of guardianship which extends to the estate as well as to the person; and it occurs only where the legal estate in lands held in socage *descends* upon an infant (*r*), in which case the guardianship devolves upon his next of blood to whom the inheritance cannot descend (*s*). For though proximity of blood is a natural recommendation to the office of guardian, the law judges it improper to trust the person of an infant in his hands, who may by possibility become the heir (*t*). Guardianship in socage, like that for nurture, continues only until the minor is fourteen years of age, except in the case of lands held in gavelkind, where the office lasts a year longer (*u*).

4. *Guardianship by statute (commonly called testamentary guardianship).*—By the 12 Car. II. (1660), c. 24, a father may, by deed or will, dispose of the custody of such

(*o*) Co. Litt. 88 b, and see Hargrave's notes 11, 12 (18th ed.); *Ratcliff's Case* (1593), 3 Rep. 38 b.

(*p*) Macpherson, *Infants*, p. 57.

(*q*) Co. Litt. 88 b, Hargrave's note 13 (18th ed.).

(*r*) Co. Litt. by Harg. 87 b, n. (1).

(*s*) *Ibid.* 88; Bac. Ab. *Guardian*, B.

(*t*) Glanv. l. 7, ch. 11; St. Hibern. (1229), 14 Hen. 3.

(*u*) Bac. Ab. *Guardian*, A. 2.

of his children as are infants and unmarried at his death, or born posthumously, to any person he pleases, and this as against all persons claiming to be guardians in socage or otherwise. The guardian thus appointed has the custody both of the person of the ward (*x*) and also of his or her estate, both real and personal (*y*). But the statute having made no mention of the mother, she therefore remained incapable of appointing a guardian to her children (*z*). Her incapacity in this respect has, to some extent, been removed by the Guardianship of Infants Act, 1886, already mentioned (*a*).

5. *Guardianship by election*, which is a species of guardianship recognised by the law, though not of frequent occurrence. For an infant having lands in socage may, after fourteen, when the guardianship in socage terminates, elect a guardian for himself, if there be no other then ready to take charge of him and his property; and, according to Lord Coke, the same thing may be done in certain cases by an infant under fourteen. But the law on this subject is obscure, and the election, at whatever age it is made, in no case superseding the authority of the court to interfere for the infant's protection, this kind of guardianship is now almost wholly disused (*b*).

6. *Guardianship by appointment of the High Court of Justice.*—This species of guardianship is of comparatively modern origin; for, it being found expedient to provide for cases in which the father failed to exercise his statutory power, the court, on an application made to it on behalf of an infant possessed of property, appointed a guardian

(*x*) *Re Andrews* (1873), L. R. 8 Q. B. 153.

(*y*) *Helyar* v. *Beckett*, [1902] 1 Ch. 391.

(*z*) *Ex parte Edwards* (1747), 3 Atk. 519.

(*a*) 49 & 50 Vict. c. 27; *vide supra*, p. 340.

(*b*) Co. Litt. by Harg. 88; *Curtis* v. *Rippon* (1819), 4 Madd. 462.

for the protection both of the person and of the property of the infant (*c*). And indeed this jurisdiction would be exercised, if sufficient reason appeared, notwithstanding the existence of a guardian in socage (*d*). And the Court interfered in favour even of *bastards*; so that where the father had named a guardian by will for his bastard child (which he had no authority under the statute to do) (*e*), the court in general appointed that person the guardian, confirming the putative father's appointment (*f*). So, also, where there had been a guardian appointed under the statute, the court would regulate his conduct, and even deprive him of all authority where necessary for the real interests of the infant (*g*). And by the institution of a suit as to the estate of an infant, and even by a payment into court to the credit of the account of an infant in an administration action, though the infant is not a party, the infant becomes a *ward of the court* (*h*). Any person marrying a *ward*, without permission, is guilty of a contempt of court, and is punishable by commitment to prison (*i*).

But an infant *not possessed of property* will not, in general, be made a ward; nor will the court in general appoint a guardian for an infant so circumstanced. This is due, however, not to a want of jurisdiction in the court, but merely to the difficulty of exercising such jurisdiction in the absence of property; and the court has in proper cases repeatedly appointed guardians of infants not possessed of any property (*k*). Statutory powers of

(*c*) Co. Litt. 88 b, Hargrave's note 16; 3 Bl. Com. 427; 2 Fonb. *Tr. Eq.* 228 n.

(*d*) 2 Fonb. *Tr. Eq.* 235.

(*e*) *Sleeman* v. *Wilson* (1871), L. R. 13 Eq. 36.

(*f*) *Peckham* v. *Peckham* (1816), 2 Cox, 46.

(*g*) Spence, *Equitable Jurisdiction*, vol. i. p. 613.

(*h*) *De Pereda* v. *De Mancha* (1881), 19 Ch. D. 451.

(*i*) *Herbert's Case* (1731), 3 P. Wms. 116; *Re Martindale*, [1894] 3 Ch. 193.

(*k*) *Re Fynn* (1848), 2 De G. & Sm. 457; *Re Spence* (1849), 2 Ph. 247; *Re McGrath*, [1893] 1 Ch. 143.

appointing guardians have been conferred on the court in particular cases. Thus by the Infant Felons Act, 1840, the court may take any infant (whether possessed of property or not) who has been convicted as a felon, out of the control of his parent or other guardian, and may assign the custody of him to any other person willing to be entrusted with his charge, and able to provide for his maintenance and education. By the Criminal Law Amendment Act, 1885, s. 12, the custody of a girl under sixteen years of age may, for the reasons mentioned in the Act, be taken away from her parents and committed to any person willing to have the charge of her. Under the Prevention of Cruelty to Children Act, 1894, ss. 6, 7, the court may (for good cause) take away from the father, or step-father, or other quasi-guardian, and commit to some other fit person, the custody or care of a child under sixteen years of age. And, apart from all statutory provisions, the court has power in extreme cases to take away from a guardian and even from a father the custody of his child, and to commit it to fit and proper persons, when such a course is for the benefit of the child (*l*).

7. *Guardianship ad litem.*—This is where a person (usually the father or other ordinary guardian) is appointed by any court of justice to prosecute, or more commonly to defend, on behalf of an infant in any action or litigious proceeding therein pending, to which such infant may be party; a practice to which we have already had occasion to refer in the course of this chapter.

8. *Guardianship by custom.*—This species of guardianship is described in the books as being of two kinds: first, that which exists in lands of copyhold tenure, and which, of common right, belongs to the next of blood to whom the copyhold cannot descend, though, by special custom, it may be claimed by the lord of the manor or his

(*l*) *Shelley* v. *Westbrook* (1822), Jacob, 266; *Wellesley* v. *Beaufort* (1827), 2 Russ. 21; *Re Besant* (1879), 11 Ch. D. 508.

nominee (*m*) ; and, secondly, that which is founded on the custom of London, which entitled the mayor and aldermen, in their Court of Orphans, to the custody of the person, lands, and chattels of every infant whose parent was free of the city of London, at least if he also died within the city. Such custody lasted, in the case of males, till twenty-one, and in the case of females, till eighteen or marriage ; but this custom (with other like customs in certain other municipal places) is now fallen in disuse (*n*).

III. *The rights and duties of guardians.*—1. The legal custody of the person of an infant belongs in general to the guardian ; who, if the child be detained from him, may sue out a writ of *habeas corpus*, to have his ward brought before the court, and delivered over (if of tender age) to himself (*o*). Where the father is the guardian, he is entitled in general to this remedy, even as against the mother (*p*), though, on the other hand, the mother of an illegitimate child may claim the possession of it upon *habeas corpus*, in preference to the reputed father (*q*). A child, however, who is of an age sufficiently mature to exercise a choice on the subject, will in no case be delivered over upon *habeas corpus* to its legal guardian, not even to the father, but will be allowed to leave the court in freedom (*r*). This rule is peculiar to applications by *habeas corpus*, the foundation of which is that some person is being detained against his will ; and the law recognises and protects the right of the father to the

(*m*) 2 Watk. *Cop.* 101 ; Co. Litt. by Harg. 88 ; 3 Salk. 177.

(*n*) Co. Litt. 88 b ; Pulling, *Customs of London*, p. 196 ; *Wilkinson* v. *Miles* (1665), 1 Sid. 250 ; *Frederick* v. *Frederick* (1721), 1 P. Wms. 710.

(*o*) *Earl of Westmeath's Case* (1821), Jacob, 251 ; *R.* v. *Clarke* (1857), 7 El. & Bl. 186 ; *R.* v. *Barnardo* (1890), 24 Q. B. D. 283.

(*p*) *R.* v. *De Manneville* (1804), 5 East, 223 ; *R.* v. *Greenhill* (1836), 4 A. & E. 624.

(*q*) *Ex parte Anne Knee* (1804), 1 Bos. & P. 149.

(*r*) *R.* v. *Clarke* (1857), 7 El. & Bl. 186.

control and custody of his infant children, even after they have attained years of discretion (*s*). The guardian may not, unless by the leave of the court, take his ward out of the jurisdiction of the court (*t*).

2. With respect to the property of the ward, a guardian in socage is said to have, not barely an authority over, but the legal possession of the land as *dominus pro tempore*, and therefore he has a right either to demise it, or to occupy it himself for the ward's benefit (*u*); and he is entitled, in his own name, to bring actions against trespassers (*x*). And a testamentary guardian is equally entitled to possession of the infant's land (*y*). But no guardian can (apart from the statute) aliene the ward's estate, except by way of lease during the ward's minority; and a demise for a longer period becomes void, or at any rate voidable at the ward's option, as soon as the period of guardianship determines (*a*). A guardian by appointment of the court has, in some respects, even less power over the ward's property, for he can receive of the profits of the infant's estate no more than the court shall think fit to allow him for the infant's maintenance; and such guardian can grant no leases except with the sanction of the court, though, on the other hand, such sanction will, under the Infants' Property Act, 1830, enable him to make a lease that will bind the infant even after he attains twenty-one, or to surrender, with a view to the renewal thereof, a lease vested in the infant (*b*). Further powers of selling, leasing and otherwise dealing with the real estate of infants have been given by the Settled Land Acts, 1882 to 1890, under which, when a person who is in his own right entitled in

(*s*) *Re Agar Ellis* (1883), 24 Ch. D. 317.

(*t*) *Elliott* v. *Lambert* (1884), 28 Ch. D. 186.

(*u*) Plowd. 293; *R.* v. *Sutton* (1835), 3 A. & E. 597.

(*x*) *Wade* v. *Baker* (1697), Lord Raym. 131.

(*y*) *Helyar* v. *Beckett*, [1902] 1 Ch. 391.

(*a*) Bac. Ab. *Leases*, I. 9; *Roe* v. *Hodgson* (1750), 2 Wils. 129, 135.

(*b*) 11 Geo. 4 & 1 Will. 4, c. 65, s. 17; *Re Griffiths* (1885), 29 Ch. D. 248.

possession to land is an infant, the land is for the purposes of these Acts settled land, and the infant is to be deemed tenant for life thereof; and the powers conferred by these Acts on tenants for life are to be exercised by the trustees (if any) of the settlement, or, if there are none, by such person and in such manner as the court on the application of the infant's guardian or next friend may order (*c*). As regards the infant's personal estate, a parent or guardian appears to have no power to receive or deal with it (*d*), except in so far as the court may allow him to do so. Where, however, property is vested in trustees in trust for an infant, the trustees have power to pay to the infant's parent or guardian (if any), or otherwise to apply for or towards the maintenance, education, or benefit of the infant, the whole or any part of the *income* of such property (*e*); and wider powers are sometimes inserted in settlements and wills.

Every guardian of the estate (except, possibly, a manorial lord) is bound to give the ward, when he comes of age, an *account* of all that he has transacted on his behalf; and, upon such account, he must answer for all losses from his own wilful default or negligence. The ordinary method of enforcing this liability of the guardian is by proceedings in equity for that purpose, which may be instituted even during the ward's minority (*f*); but in taking such account, allowance will be made to the guardian for all his reasonable costs and expenses (*g*), although he is not permitted in any case to make a profit out of his ward's estate (*h*).

(*c*) Settled Land Act, 1882, ss. 59, 60; see also Settled Estates Act, 1877, and Conveyancing Act, 1881, s. 41.

(*d*) *Re Hellman's Will* (1866), L. R. 2 Eq. 362; *Re Chatard*, [1899] 1 Ch. 712; *Re Cresswell* (1881), 45 L. T. 468.

(*e*) Conveyancing Act, 1881, ss. 42, 43.

(*f*) *Eyre* v. *Shaftesbury* (1722), 2 P. Wms. 119.

(*g*) Litt. s. 123.

(*h*) *Osborn* v. *Carden* (1565), Plowd. 293.

BOOK IV.

OF PUBLIC RIGHTS.

PART I.

OF THE CIVIL GOVERNMENT.

HAVING now considered the rights and duties attaching to a man, individually considered, as regards both his person and his property, and having also now examined the rights and duties attaching to him in his private or domestic relations, or as member of a family, we have next to contemplate him as a citizen or member of the community at large, and to treat of the rights and duties which attach to him in the capacity of citizen, which he exercises in common with the rest of the community. And this we propose to do under the head of *public rights;* for *duties* being the correlative of *rights*, it will be unnecessary to refer to duties separately. Public rights, then, concern either the relation subsisting between persons in authority and those subject to such authority; or they concern the social condition in general. And, inasmuch as persons in authority are either of a civil or of an ecclesiastical character, the whole subject of public rights resolves itself into, and may be discussed under, the following three titles: the Civil Government, the Church, and the Social Economy. We shall in the first instance devote our attention to the Civil Government.

CHAPTER I.

OF THE PARLIAMENT.

[THE public rights which first claim our attention, are those which concern the relation in which men stand to one another, as governors and governed, or in other words, as magistrates and people; and of magistrates, some are *supreme*, *i.e.*, are those in whom the sovereign power of the state resides, while others are *subordinate*, *i.e.*, derive all their authority from the supreme magistrate and are accountable to him for their conduct. So long as states are in an early stage of organisation, the supreme magistracy, or the right as well of *making*, as of *enforcing*, and of *interpreting* the laws, is generally found to be vested in one man or one body of men,—a conjunction which has been considered, not quite rightly (*a*), by political theorists to be inimical to true public liberty. But in a highly developed community like England, the governing power is usually divided into three branches, viz., the legislature, the executive, and the judicial. It will be the business of this chapter to consider the legislative power, which is vested, by our constitution, in the Parliament.

The first institution of parliament is one of those matters which lie hidden in the dark ages of antiquity; but it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm, a practice which seems to have been universal among the northern, particularly the German, nations (*b*). In England,

(*a*) See Dicey, *Law of the Constitution*, ch. 12, pp. 328, 333.

(*b*) "*De minoribus rebus principes consultant, de majoribus, omnes.*"—Tacitus, *De Mor. Germ.* ch. 11.

[this general council hath been held immemorially, under the several names of *michel-synoth* or great council, *michel-gemote* or great meeting, and more frequently *witena-gemot* or the meeting of wise men ; and we have instances of its meeting to order the affairs of the kingdom, to make new laws, and to mend the old,—or, as Fleta expresses it, "*novis injuriis emersis, nova constituere remedia*,"—so early as the reign of Ina king of the West Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the heptarchy (*c*). And after the union of the different Saxon kingdoms, as the Mirrour (*d*) informs us, King Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener if need be, to treat of the government of God's people. The subsequent Saxon and Danish monarchs also held frequent councils of this sort, as appears from their respective codes of laws (*e*) ; and there appears to be no doubt, that these great councils were also held under the first princes of the Norman line. For Glanville, who wrote in the reign of Henry the Second, speaking of the particular amount of an amercement in the sheriff's court, says it had never been yet ascertained by the general assize, or assembly, but was left to the custom of particular counties (*f*) ; the general assize here spoken of being none other than the *witena-gemot* or parliament, whose statutes are put in contradistinction to custom. And, in the case of the Abbey of St. Edmund's-bury, in Edward the Third's time, an Act of Parliament, made in the reign of William the Conqueror, was pleaded, and judicially allowed by the court (*g*).

(*c*) Fleta, l. 2, ch. 2.

(*d*) C. 1, s. 3.

(*e*) "All their laws" (the laws of the Anglo-Saxons) "express the "assent of this council, and there "are instances where grants made "without its concurrence have "been revoked. It was composed "of prelates and abbots, of the "aldermen of shires, and, as it is "generally expressed, of the noble "and wise men of the kingdom." —Hallam, *Mid. Ages*, vol. ii. p. 277 (12th ed.).

(*f*) Fleta, l. 9, ch. 10.

(*g*) Year Book, 21 Edw. 3, 60.

[Hence it indisputably appears that parliaments, or general councils, were coeval with the kingdom itself. How those parliaments were constituted is another question (*k*); but it is generally agreed, that the constitution of parliament, as it now stands, was in the main marked out so long ago as the seventeenth year of King John, A.D. 1215. For, in the great charter granted by that prince, he promises to summon all the archbishops, bishops, abbots, earls, and greater barons, personally, and all the other tenants *in capite* of the Crown, by the sheriffs and bailiffs, to meet at a certain place, with forty days' notice, to assess aids and scutages when necessary. And this constitution has in fact subsisted at least from the year 1264 (49 Hen. III.), there being still extant writs of that date to summon knights and citizens or burgesses to parliament (*l*). We may proceed, therefore, to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of over six hundred years. And in the prosecution of this inquiry we shall consider, first, the manner and time of the assembling of parliament; secondly, its constituent parts; thirdly, the laws and customs of the parliament, considered as one aggregate body; fourthly and fifthly, the laws and customs of each house separately; sixthly, the methods of proceeding, and of making statutes, in both houses; and lastly, the manner of the adjournment, prorogation, and dissolution of parliament.

I. *As to the manner and time of the assembling of Parliament.*—No parliament may be convened of its own

(*k*) Hallam, *Mid. Ages*, vol. iii. ch. 8.

(*l*) "It is well known that the "earliest writs of summons to "cities and boroughs, of which "we can prove the existence, are "those of Simon de Montfort, "Earl of Leicester, bearing date "12th December, 1264, in the "forty-ninth year of Henry the "Third. After a long controversy, "almost all judicious inquirers "seem to have acquiesced in "admitting this origin of popular "representation."—Hallam, *Mid. Ages*, vol. iii. p. 27 (12th ed.).

[authority, but by the authority of the Crown alone; although it is provided by the Meeting of Parliament Act, 1797, that, on the demise of the Crown, if there be then no parliament in being, the last parliament shall revive; and in this case, it sits again for six months, unless sooner dissolved.

It is true that, by the Triennial Act of 1640, if the king neglected to call a parliament for three years, the chancellor or, failing him, the peers might assemble and issue out writs for choosing one; and in case of their neglect, the electors for counties and boroughs might meet and choose their own representatives. But that Act, as being detrimental to the royal prerogative, was repealed by the 16 Car. II. (1664), c. 1. It is true also, that the Convention Parliament, which restored Charles the Second, met above a month before his return, the lords of their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of Parliament. But that was for the necessity of the thing; and the first step taken after the king's return in 1660 was to pass an Act (12 Car. II., c. 1), declaring the Convention Parliament to have been a good parliament, notwithstanding the defect of the king's writ, which declaration was reiterated by the 13 Car. II. (1661), st. 1, cc. 7 and 14. It is likewise true, that at the time of the Revolution, A.D. 1688, the lords and commons, of their own authority and upon the summons of the Prince of Orange (afterwards King William), met in a convention, and therein disposed of the crown and kingdom. But this assembling also was of necessity, and upon a full conviction that King James the Second had abdicated the government.

By the antient statutes of the realm, the king was bound to convoke parliament every year, or oftener, *if need be* (*k*); and by the Triennial Act of 1640, the sitting

(*k*) 4 Edw. 3 (1330), c. 14; 36 Edw. 3 (1362), c. 10.

[and holding of parliaments was not to be intermitted above three years at the most. By the Bill of Rights of 1689, parliament was required to be held *frequently*, for the redress of all grievances, and for the amending, strengthening, and preserving of the laws; and by the 6 & 7 W. & M. (1694), c. 2, s. 2, a new parliament was required to be called within three years after the determination of a former one. The importance of these provisions has been, however, much lessened in modern times by the course of public business, the exigencies of which invariably lead to the assemblage of parliament in every year. And we may here note, that by Magna Carta forty days were required to intervene between the date of the king's writ for the assembling of parliament, and the actual assembling,—a provision re-enacted by the 7 & 8 Will. 3 (1695), c. 25. But by the Meeting of Parliament Act, 1852, the forty days have been reduced to thirty-five; and apparently no particular interval of time need intervene between the end of one session, and the commencement of another session of the same parliament.

II. *The constituent parts of parliament.*—These are the monarch in his royal or political capacity, and the three estates of the realm, to wit, the lords spiritual, the lords temporal, and the commons. The Crown and these three estates together form the great body politic of the kingdom (*l*), the Crown being *caput*, *principium*, *et finis* (*m*). The lords spiritual and temporal sit with the king in one house, and the commons sit by themselves in another (*n*).

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch,

(*l*) 4 Inst. 1, 2; 1 Eliz. c. 3 (1559); Hale, *Parl.* 1.

(*m*) 4 Inst. 6.

(*n*) The doctrine that the lords spiritual and temporal form two estates of the realm has grown up in recent years, with the disappearance of the House of Clergy. Originally the "three estates of the realm" were—the lords, the clergy, and the commons.—E. J.

[and a branch only of the legislature. The king is himself, therefore, a part of parliament, although the share of legislation, which at the present time *in theory* belongs to him under the constitution, consists in the power of rejecting rather than of resolving; that is to say, the Crown does not of itself begin any alteration in the established laws, but may disapprove of the alterations proposed to be made therein by the two houses.] *In practice*, however, the Crown's right of veto has long since become obsolete, not having been exercised (with one exception) for more than two hundred years. In the year 1692 William the Third refused his assent to the bill for triennial parliaments, but was prevailed upon to permit it to be enacted two years afterwards; and in 1707 Queen Anne refused her assent to a Scotch militia bill (*o*).

[We will first consider the three estates of the realm, passing over for the present the king, who, with his divers prerogatives, will be the subject of later chapters.

And first the "lords spiritual" consist of the Archbishops of Canterbury and York, the Bishops of London Durham, and Winchester, and twenty-one other bishops, being twenty-four bishops in all, besides the two archbishops. The spiritual lords have been supposed to hold certain antient baronies under the Crown; for William the Conqueror thought proper to change the spiritual tenure of frank-almoign (or free alms), under which the bishops had held their lands during the Saxon Government, into the feudal or Norman tenure by barony (*p*). And it is maintained by some writers that it was in right of their succession to those baronies, that the bishops were allowed seats in the house of lords (*q*),] while according to other

(*o*) De Lolme, *Const. of Engl.*, p. 404; 18 Lords' Journals, 506.

(*p*) Gilb. *Hist. Exch.* 55; Spelm. W. I. 291.

(*q*) Co. Litt. by Harg. 134 b, n. (1); Hallam, *Mid. Ages*, vol. iii. pp. 4, 5 (12th ed.).

authorities they sat in virtue of their *official* wisdom (*r*); but they are not, strictly speaking, "*peers of the realm*" (*s*).

And we may here observe, that, prior to the dissolution of the monasteries by Henry the Eighth, the spiritual lords comprised also twenty-seven mitred abbots and two priors (*t*); also, that after the union with Ireland, in 1801, there sat and voted in the house of lords the Archbishops of Dublin and of Armagh alternately, together with three other Irish bishops. But, under the Irish Church Disestablishment Act, 1869, no archbishop or bishop of the Church of Ireland has, since the 1st January, 1871, a seat in the house of lords.

The lords spiritual are usually spoken of as a distinct estate from the lords temporal, and are so distinguished in many Acts of Parliament; yet in practice they are usually blended together under the one name of "the lords." They vote together, and the majority of votes binds both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued very cogently, that the lords temporal and spiritual are now, in reality, only one estate (*u*).

And here we may observe, that the Bishop of Sodor and Man is not entitled to vote as a spiritual lord; but that, with regard to bishoprics of recent creation (such as Manchester, St. Albans, Truro, Liverpool, &c.), the bishops are summoned as spiritual lords successively, according to their seniorities, on the occurrence of any vacancy in one or other of the twenty-four antient bishoprics, other than those of London, Durham, and Winchester, which always entitle to seats in the house (*x*).

(*r*) Medley, *Constitutional Hist. of England* (2nd ed.) pp. 145—148.

(*s*) Staunford, P. C. 158.

(*t*) Co. Litt. 97; Seld. *Tit. Hon.* 2, 5, 27.

(*u*) Whitelock, *Parliam.* ch. 72; Warburt. *Alliance*, b. ii. ch. 3; Dyer, 60; Baronage, p. 1, ch. 6; Keilw. 184; 2 Inst. 585—587; 4 Inst. 25. See above, p. 365, note (*n*).

(*x*) As to *Manchester*, see the Ecclesiastical Commissioners Act, 1847; *St. Albans*, the St. Albans

Secondly, the "lords temporal" consist exclusively of *peers*, or persons of the rank of nobility, whether they be dukes, marquesses, earls, viscounts, or barons. Of the lords temporal the majority sit in their own right as peers of the United Kingdom, but a certain number of them sit in a representative capacity, while the four Lords of Appeal in Ordinary are lords of parliament during their lives (*y*). The representative peers are those who, under the respective Acts of Union with Scotland and Ireland (*z*), are elected to represent respectively in the House of Lords the bodies of the Scottish and Irish nobility,—the Scottish representative peers being sixteen in number, elected for one parliament only, and the Irish twenty-eight, elected for life (*a*).

[The aggregate number of the lords temporal for the time being is indefinite, and may be increased at will by the power of the Crown. The distinction of rank is necessary in every well governed state, in order to reward eminent public services in a manner the most desirable to individuals, and the least burdensome to the community; and the nobility being thus expedient to the state, it is expedient also that they should form an independent

Bishopric Act, 1875; and *Truro*, the Truro Bishopric Act, 1876. See also the Bishoprics Act, 1878, providing for the foundation of additional bishoprics at *Liverpool*, *Newcastle*, *Southwell*, and *Wakefield*; and the Bishopric of Bristol Act, 1884, providing for the constitution of a bishopric of Bristol separate from that of Gloucester and Bristol. Under the earlier Act, bishoprics of *Liverpool*, *Newcastle*, *Southwark*, and *Wakefield* have been already established; and under the later Act (amended by the Bishopric of Bristol Amendment Acts, 1894 and 1896), the separate bishopric of Bristol has been established.

(*y*) The Appellate Jurisdiction Acts, 1876 and 1887.

(*z*) *Vide sup.* vol. i. pp. 47—55.

(*a*) See (as to the election of the sixteen Scottish peers), the Union with Scotland Act, 1706, the Representative Peers (Scotland) Act, 1847, and the Representative Peers (Scotland) Act, 1851; and (as to the election of the twenty-eight Irish peers) the Union with Ireland Act, 1800, the Representative Peers (Ireland) Act, 1857, and the Election of Representative Peers (Ireland) Act, 1882.

[branch of the legislature, because otherwise their privileges might be overborne in some popular tumult, or (what is perhaps more probable) their social pre-eminence might end by corrupting the popular representation.

Thirdly, the "commons" consist of the representatives of the nation at large, exclusive of the peerage; and they are elected by the means that we shall presently have occasion to explain. Formerly the counties were represented by knights, and the cities and boroughs by citizens or burgesses;] but the distinction between knights and burgesses (which had long been merely social) has now entirely ceased, as a consequence of the assimilation of the county with the borough franchise, under the Representation of the People Act, 1884, and the Redistribution of Seats Act, 1885. In addition, the Universities of Oxford, Cambridge, and London, are represented by persons chosen by their respective graduates; as are also the Scottish Universities, and the University of Dublin.

The collective number of English and Welsh representatives prior to the changes made by the Redistribution of Seats Act, 1885, was 493, of Scottish Representatives 60, and of Irish representatives 105,—in all 658; but under and in consequence of the last-mentioned Act, the aggregate number of representatives is now 670, of whom 495 represent English, 72 Scottish, and 103 Irish, constituencies. [But every member, though chosen by one particular district, once he is elected and returned, serves for the whole realm; the end of his coming thither being not particular, but general, not barely to advantage his constituents, but the commonwealth as a whole, to advise the Crown (as appears from the writ of summons) "*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus*" (*b*). And therefore he is not bound to consult with, or to take the advice of, his constituents

(*b*) 4 Inst. 14.

[upon any particular point, unless he himself thinks proper and prudent so to do.

These are the several parts of parliament; and the consent of all three is required to make any new law that shall bind the subject. For though, in the time of the Great Rebellion, the commons once passed a vote (*c*), "that whatsoever is enacted or declared for law by the "commons of England in parliament assembled, hath "the force of law, . . . although the consent and "concurrence of king or house of peers be not had "thereto," yet when the constitution was restored in all its forms, it was particularly enacted, by the 13 Car. II. (1661), st. 1, c. 1, that if any person should advisedly affirm that both or either of the houses of parliament have any legislative authority without the king, such person should incur all the penalties of a *præmunire*, that is to say, should forfeit all his lands and goods, and should suffer imprisonment and lose all civil rights.

III. *The laws and customs of the parliament.*—The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds (*d*). It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal. All mischiefs and grievances that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal; and, in its omnipotence, it can even regulate or new model the succession to the Crown, alter the established religion, change the constitution, and, in short, do everything that is not naturally impossible.

In order to prevent the mischiefs which might arise by placing this extensive authority in hands that are either

(*c*) 4th Jan. 1649. (*d*) 4 Inst. 36.

[unfitted or improper to manage it, it was part of the custom and law of parliament, that no one should sit or vote in either house, unless he were twenty-one years of age (*e*). The rule, however, was not infrequently broken, till it was expressly declared in 1695 by the 7 & 8 Will. III. c. 25 (*f*). Further, an alien, unless naturalized, cannot serve in parliament (*g*); and an alien, even although naturalized, was disqualified in 1700 from so serving (*h*), but since 1870, this too stringent rule has been relaxed (*i*). Also, by the 30 Car. II. (1678), st. 2, 13 & 14 Will. III. (1701), c. 6, and 1 Geo. I. (1714), st. 2, c. 13, no member could at one time either vote or sit in either house till he had taken the several oaths of allegiance, of supremacy, and of abjuration, and made a declaration against transubstantiation.] However, in place of these, a single oath was provided by the Parliamentary Oaths Act, 1866; and under that Act, and the Promissory Oaths Act, 1868, the oath was so framed as to suit (it was hoped) all members whether they belonged to the Church of England or not, and the more especially so, as any members who (as being Quakers, Moravians, or Separatists) were permitted by law to *affirm* (*k*), might on taking their seats make and subscribe their "affirmation" in the same form as, but in lieu of taking, the oath (*l*). But inasmuch as the relaxation in question did not extend to openly professed atheists (*m*), it has now been provided by the Oaths Act, 1888, that anyone objecting to be sworn, and stating, as the ground of his objection, either that he has no religious belief, or

(*e*) Whitelocke, ch. 50; 4 Inst. 47.

(*f*) Com. Journ. 16 Dec. 1690.

(*g*) *Ibid.* 10 March, 1623.

(*h*) Act of Settlement, 1700.

(*i*) Naturalisation Act, 1870.

(*k*) See (as to *Quakers* and *Moravians*), the Quakers and Moravians Act, 1833; and (as to *Separatists*) 3 & 4 Will. 4 (1833), c. 82 (since repealed); also the Quakers and Moravians Act, 1838.

(*l*) Parliamentary Oaths Act, 1866, s. 4 (since repealed); Promissory Oaths Act, 1868, s. 11.

(*m*) *Clarke* v. *Bradlaugh* (1881), 7 Q. B. D. 38; 8 Q. B. D. 63; (1883), L. R. 8 App. Ca. 354.

that the taking of an oath is contrary to his religious belief, may make a solemn affirmation to the effect of the appropriate oath, and in lieu of such oath. This provision is clearly applicable to parliament as well as to courts of justice.

It is also law, that [if any person is made a peer, or is elected to serve in the commons, yet the respective houses, upon complaint and proof of any crime in such person, may adjudge him incapable of sitting as a member; and this, by the custom of parliament (*n*). For, as every court of justice hath laws and customs for its governance, so the high court of parliament has also its own peculiar law, called the *lex et consuetudo parliamenti* (*o*), and matters appropriate exclusively to either house are determined by that house alone (*p*). Wherefore, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; and the commons do not allow the lords to judge of the election of a burgess.

The *privileges* of parliament are very considerable, and were originally established for the protection of its members, as well from being molested by their fellow subjects, as from being oppressed by the Crown. Regarding these privileges, Sir John Fortescue, in the thirty-first year of Henry the Sixth, declared, "that it "hath not been used aforetime that the judges should in "anywise determine the privileges of the High Court of "Parliament" (*q*).] But Lord Holt was of opinion, "that the authority of parliament being from the law, is "circumscribed by the law; and if the privilege is "exceeded, the act is wrongful equally with the act of a

(*n*) Whitelocke, *Parliament*, ch. 102; Lords' Journ. 3 May, 1620; 13 May, 1624; 26 May, 1725; Com. Journ. 14 Feb. 1580; 21 Jun. 1628; 21 Jan., 9 Nov. 1640; 6 Mar. 1676; 6 Mar. 1711; 3 Feb. 1769; 17 Feb. 1769; 3 May, 1783; and *vide post*, p. 397.

(*o*) 1 Inst. 11; 4 Inst. 50.

(*p*) 4 Inst. 15; *Burdett* v. *Abbot* (1811), 14 East, 150; *Stockdale* v. *Hansard* (1839), 9 A. & E. 1; *Bradlaugh* v. *Gossett* (1884), 12 Q. B. D. 271.

(*q*) Selden, *Baronage*, pt. 1, c. 4.

"private individual" (*r*). Which opinion is the one latterly accepted (*s*).

[The two best-known privileges of parliament are privilege of speech and privilege from arrest. As regards privilege of speech, the Bill of Rights of 1689 declared, that it was one of the liberties of the people, "that the "freedom of speech and debates and proceedings in par- "liament, ought not to be impeached or questioned in any "court or place out of parliament"; and accordingly this privilege is specifically demanded of the Crown by the speaker of the house of commons, at the opening of every new parliament (*t*).] And as regards privilege from arrest, a peer is, by virtue of his dignity, exempt from arrest in civil cases at all times (*u*); and a member of the house of commons is, by the privilege of parliament, so exempt while the house is sitting, and also for such a period before the first meeting, and after the dissolution of a parliament, as may enable him conveniently to come to the house from, and to return to, any part of the kingdom (*x*). [This immunity continues also for forty days after every prorogation, and for forty days before the next appointed meeting (*y*), which is often, in effect, so long as the parliament subsists, parliament not seldom being prorogued for less than fourscore days at a time.

The courts antiently took cognizance of the privilege from arrest, by issuing a writ of privilege in the nature of a *supersedeas*, to deliver the member out of custody when arrested in a civil suit (*z*). For when a letter was

(*r*) *Paty's Case* (1705), 2 Ld Raym. 1114.

(*s*) *Stockdale* v. *Hansard* (1839), 9 A. & E. 1; (1840), 11 A. & E. 253; *Howard* v. *Gosset* (1845), 10 Q. B. 359.

(*t*) May, *Law of Parl.*, 10th ed., p. 57.

(*u*) 6 Rep. 52 a; 9 Rep. 49 a, 68 a; *Couche* v. *Lord Arundel* (1802), 3 East, 127; *Countess of Huntingdon's Case* (1675), 1 Vent. 298; *Davis* v. *Lord Rendlesham* (1817), 7 Taunt. 679; *R.* v. *Bishop of St. Asaph* (1752), 1 Wils. 332 (K. B.).

(*x*) *Cassidy* v. *Steuart* (1841), 2 Man. & G. 437.

(*y*) *E. of Athol* v. *Derby* (1672), 2 Lev. 72; *Goudy* v. *Duncombe* (1847), 1 Exch. 430.

(*z*) *Skewys (executors)* v. *Shamond* (1545), Dy. 59; 4 Pryn. *Brev. Parl.* 757.

[written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as being contrary to their oath of office (*a*). But when the 12 & 13 Will. III. (1700), c. 3, enacted that no privileged person should be subject to arrest or imprisonment, it was held that such arrest was irregular *ab initio*, and that the party might accordingly be discharged upon motion (*b*). There is, however, no precedent of any such writ of privilege in criminal proceedings, but only in civil suits; and the 1 Jac. I. (1604), c. 13, and 12 & 13 Will. III. (1700), c. 3, speak only of civil actions, and the claim of privilege is usually guarded so as not to extend to treason, felony, or breach of the peace (*c*). Instances are not wanting wherein privileged persons have been convicted of misdemeanors, and either committed or prosecuted to outlawry, in the middle of a session (*d*); and this limit to, or exception from, the privilege afterwards received the approbation of parliament (*e*). As regards the writing and publishing of *seditious libels*, it was resolved by both houses that there was no privilege in such a case (*f*). The principle of this resolution extends equally to every indictable offence; and the privilege is not available, where the arrest is for contempt of court or on a writ of attachment (*g*), provided such arrest be punitive in its nature, and not merely civil process to enforce obedience to the court's order (*h*). Even in indictable cases, however, there belongs to the houses of parliament the right to receive immediate information of the imprisonment or detention of any member, with the reason for which he is detained (*i*); and the practice

(*a*) *Hodges* v. *Moor*, Latch. 48; Noy, 83.

(*b*) *Holliday* v. *Pitt* (1733), Str. 985.

(*c*) 4 Inst. 25; Com. Journ. 17th Aug. 1641; Com. Journ. 20th May, 1675.

(*d*) Mich. 16th Edw. 4, in Scacc.; Ld. Raym. 1461.

(*e*) Com. Journ. 16th May, 1726.

(*f*) *Ib.* 24th Nov.; Lords' Journ. 29th Nov. 1763.

(*g*) *Gent-Davis* v. *Harris* (1888), 40 Ch. D. 190.

(*h*) *Re Armstrong*, [1892] 1 Q. B. 327.

(*i*) Com. Journ. 20th Apr. 1762.

[is recognized by divers temporary statutes for suspending the *Habeas Corpus* Act, whereby it has been usually provided, that no member of either house shall be detained till the matter of which he stands suspected be communicated to the house of which he is a member, and the consent of the house be obtained for his commitment (*j*). But the usage has uniformly been, ever since the Revolution, that the communication has been subsequent to the arrest (*k*).

There were also, at one time, privileges of parliament, protecting the lands and goods of the members, and even their menial servants, not only from illegal violence, but also from seizure under the civil processes of the courts of law. Even now to assault with violence a member of either house, or his menial servants, is a high contempt of parliament, and is punished with the utmost severity; and peculiar penalties were at one time annexed to this offence by the 5 Hen. IV. (1403), c. 6, and 11 Hen. VI. (1433), c. 11.] But all parliamentary exemptions from liability to civil process, save only as to the freedom of the *person* of the member himself, are now at an end, having been first restrained, and at length totally abolished, by the legislature. For, by the Parliamentary Privilege Act, 1770, it was enacted, in extension of certain previous statutes (*l*), that an action might be brought against a member of either house, or against his servants, or against any other person entitled to privilege of parliament; and that no such action, nor any process, or proceeding thereupon, should be impeached, stayed, or delayed by pretence of privilege, except that the *person* only of the member himself should not thereby be subjected to arrest.

(*j*) See particularly 17 Geo. 2 (1743), c. 6; Protection of Person and Property (Ireland) Act, 1881; Peace Preservation (Ireland) Act, 1881, continued by the Peace Preservation (Ireland) Continuance Act, 1886, and by the Criminal Law and Procedure (Ireland) Act, 1887, s. 8, but now expired.

(*k*) See *Mr. Gray's Case*, M.P. for Dublin, 1882, committed for contempt of court by Lawson, J.

(*l*) 12 & 13 Will. 3 (1700), c. 3; 2 & 3 Anne (1703), c. 12; The Parliamentary Privilege Act, 1737.

In addition to the privileges of freedom of speech and of freedom from arrest, the right of parliament freely to publish its own reports, papers, votes, and other proceedings, is now specially protected by statute. For it has been provided by the Parliamentary Papers Act, 1840, that any one on being sued or prosecuted on account of the publication of such matters by authority of either house, may have the proceedings against him stayed, and all process therein superseded, on production to the court of a proper certificate of such authority; and that no person shall be liable to any civil or criminal proceeding for printing extracts from or abstracts of parliamentary documents, provided he do so *bonâ fide* and without malice (*m*). It is moreover clearly settled, that in any case in which the privileges of either house of parliament have been violated, that house has power to commit to prison the person guilty of such contempt (*n*); and also, by its order, to set at liberty any one who, in breach of its privileges, has been arrested in respect of any act by him done in his capacity of member of parliament (*o*).

These being the laws and customs of parliament, regarded as one aggregate body, we will now consider the laws and customs of each house separately, first, those of the House of Lords, and secondly, those of the House of Commons.

IV. *The laws and customs relating to the House of Lords.*—[One very antient privilege (worth mentioning only as illustrative of a former era) is that declared by the Charter of the Forest (*p*), of the ninth year of Henry the Third, viz., that every archbishop, bishop, earl, or baron, "coming to us at our commandment," passing through the king's forests, may kill one or two of the king's deer without warrant, in view of the forester, if he be present, or on blowing a

(*m*) *Stockdale* v. *Hansard* (1840), 11 A. & E. 297.

(*n*) *Burdett* v. *Abbot* (1811), 14 East, 158.

(*o*) 1 Jac. 1 (1604), c. 13.

(*p*) Carta de Foresta, c. 11, confirmed 25 Edw. 1 (1297).

thorn, if he be absent. In the next place, the peers have a right to be attended by the judges, and also by certain of his Majesty's counsel, for the greater dignity of their proceedings; and in the exercise of their appellate jurisdiction, it was often their practice to request the opinion of the judges, in point of law, upon the question which was before them for their determination. But the power of summoning the judges has only been exercised twice since the passing of the Judicature Act (*q*). The secretaries of state, with the attorney and solicitor-general used also to attend the house of peers, and have to this day (together with the judges and the King's counsel above referred to) their regular writs of summons issued out at the beginning of every parliament (*ad tractandum*, but not *ad consentiendum*) (*r*); but whenever they have been members of the house of commons (*s*), their attendance on the lords has of late years fallen into disuse (*t*). Another privilege of the peers formerly was that every peer, by licence obtained from the Crown, might make another lord of parliament his proxy, to vote for him in his absence (*u*),—a privilege which a member of the other house neither can nor could have, as he is himself but a proxy for a multitude of other people (*x*). But, by the orders of the house itself, no proxy might vote on a question of guilty or not guilty; and only a spiritual lord could be proxy for a spiritual lord, and a temporal lord for a temporal lord. And since 1868 this privilege has been waived in virtue of a resolu-

(*q*) *Dalton* v. *Angus* (1881), 6 A. C. 740; *Allen* v. *Flood*, [1898] A. C. 1.

(*r*) Stat. 31 Hen. 8 (1539), c. 10; Smith, *Commonw.* b. 2, ch. 3; Moor, 551; 4 Inst. 4; Hale, *Parl.* 140.

(*s*) Com. Journ. 11th April, 1614; 8th Feb. 1620; 10th Feb. 1625; 4 Inst. 48.

(*t*) There are several resolutions before the Restoration, declaring the attorney-general, on account of this attendance, incapable of sitting among the commons; and Sir Heneage Finch is said to have been the first attorney-general who so sat.

(*u*) Seld. *Baronage*, p. 1, ch. 1.

(*x*) 4 Inst. 12; Com. *Dig. Parl.* D. 19; 1 Woodd. 41.

[tion of the house, and all votes are now given in person (*y*). Every peer has a right, when a vote passes contrary to his sentiments, to enter with the leave of the house, his dissent on its journals, with the reasons for such dissent, which is usually called his *protest* (*z*). All bills that may in their consequences affect the rights of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers; and they are to suffer no changes or amendments in the house of commons, though the latter house has the power of rejecting them altogether.]

By the Bankruptcy Disqualification Act, 1871, as amended by the Bankruptcy Act, 1883, s. 32, no writ of summons can be issued to a bankrupt peer; and every peer who *becomes* bankrupt is disqualified from sitting or voting in the house of lords, until his bankruptcy shall have been determined as in the Acts provided. And the disqualification is now to be removed only if the adjudication is annulled, or if the bankrupt obtains his discharge with a certificate that the bankruptcy was caused by misfortune, and not by misconduct.

V. [*The laws and customs of the House of Commons.*—These concern either (1) The raising of taxes, or (2) The election of members.

And, first, with regard to the raising of TAXES. It is the antient indisputable privilege and right of the house of commons, that all grants or subsidies, or parliamentary aids, do begin in their house (*a*); although their grants are not effectual to all intents and purposes, until they have the assent of the other branch of the legislature. The reason commonly given for this exclusive privilege is, that the supplies are raised upon the body of the

(*y*) Pike, *Const. Hist. of House of Lords*, 245.

(*z*) Lord Clarendon relates, that the first instances of protests with reasons, in England, were in 1641, before which time they usually only set down their names as dissentient to a vote. (1 Ld. Mountm. 402. Pike, *ib.* 246.)

(*a*) 4 Inst. 29.

[people, and it is proper, therefore, that they alone, through their representatives, should impose the taxes; a reason which would be unanswerable if the commons taxed none but themselves, but the property of members of the house of lords is equally taxable with that of the commons. The true reason, therefore, seems rather to be this, that the lords being an hereditary body, created, and so more liable than the commons to be influenced, by the Crown, it would be extremely dangerous to give them any power of framing new taxes. So jealous are the commons of this privilege, that they will not permit the least alteration or amendment to be made by the lords in any *money bill*, *i.e.*, any bill by which any money whatsoever is directed to be raised upon the subject; and the rule extends even to bills imposing pecuniary penalties or fines (*b*). Finally, since 1861, in *practice* the right of the lords even to *reject* a money bill has disappeared (*c*).

Secondly, with regard to ELECTIONS. The election of members to serve in the house of commons is the act of the people at large; and in considering this matter, we shall have to consider,—1. The qualification of the electors; 2. The qualifications of the elected; and 3. The proceedings at elections.

1. As to the FRANCHISE, or qualifications of the ELECTORS.—The reason of requiring a qualification in voters is to exclude such persons as are in so mean a situation as to be specially open to the undue influence of others; and although upon the true principles of

(*b*) According to Sir Mathew Hale (*Parliaments*, 65, 66), it is allowable for the lords to alter a money bill by *shortening* the period for which a tax is granted; and in such case, he is of opinion that the bill need not be sent back to the commons for their concurrence, but may receive the royal assent without further ceremony. [See Year Book, 33 Hen. 6, 17; Resolution of House of Commons, Commons Journal, ix. 235, 509; but see May, *Law of Parl.*, 10th ed., p. 547.]

(*c*) Anson, *Law and Custom of the Constitution* (3rd ed.), i. 267; Hansard, vol. xxvii. (4th series), pp. 985, 1222 *et seq.*

[liberty, every member of the community, however poor, should have a vote,] and it has been one of the objects of our constitution to secure him some share in the election of representatives, yet the rights of property cannot be wholly disregarded.

And, first, of the qualifications which belong to the electors for COUNTIES.—The knights of shires, (that is to say, the members for counties, or divisions of counties,) were originally representative of the landed interest; and their electors, therefore, were until recently required to have estates in lands or tenements within the county represented. An estate of the value of 40*s.* per annum of free tenure, and in which the voter had also a freehold interest, was formerly the invariable qualification (*d*). And the law so continued until the year 1832, when, by the Representation of the People Act, 1832 (commonly called the Reform Act), new provisions were made with respect to the nature and value of the estates by which county, as well as other, electors should be qualified. The qualifications introduced by the great Reform Act have since been further regulated by the Representation of the People Acts, 1867 and 1884. And under the combined effect of this legislation, the lands or tenements in respect of which a vote may be claimed for the county, may now be either of freehold, of copyhold, or of any other tenure, and may be held either in fee or for life, or for years, or even by mere occupation (*e*). But no mortgagee is to have any vote by reason of his mortgage, unless he be in possession, the right of voting remaining in the mortgagor; and no trustee is to have any vote by reason of his trust estate, but the *cestui que trust* in possession is to have the vote (*f*).

(*d*) 8 Hen. 6 (1429), c. 7; 10 Hen. 6 (1432), c. 2.

(*e*) Representation of the People Act, 1832, ss. 18, 20; Representation of the People Act, 1867, ss. 5, 6.

(*f*) Representation of the People Act, 1832, s. 23; Parliamentary Voters Registration Act, 1843, s. 74.

The value of the qualifying estate differs according to the different tenures. For (1) As to *freeholds*, with respect to all freeholders of inheritance, and also with respect to all freeholders for *life* (provided these latter were in the actual *bonâ fide* occupation, or had acquired their freeholds by marriage, marriage settlement, devise, or promotion to any benefice or office), the qualification remained the same after as well as before the passing of the Representation of the People Act, 1832, viz., "40*s.* by the year at least, above all charges" (*g*); this last-mentioned qualification when originally established by the 8 Hen. VI. (1429), c. 7, being of substantial amount, the sum of 40*s.* having been equal to 12*l.* in the reign of Queen Anne, and to 20*l.* in the time of George III. But with respect to other freeholders, their lands or tenements must be of "the clear yearly value of not less than 5*l.* "(formerly 10*l.*), above all rents and charges payable "out of or in respect of the same" (*h*); and a freehold rentcharge, although at one time a qualification (*i*), has now (under sect. 4 of the Representation of the People Act, 1884) ceased to be so, unless it be a tithe rentcharge. (2) As to *copyholds* and *customary freeholds*, persons seised thereof at law or in equity for life or lives, or for any larger estate, are qualified to vote for the county, if the property is of the "clear yearly value of "not less than 5*l.*, over and above all rents and charges "payable out of or in respect of the same" (*k*). (3) As to *leaseholds*, every person entitled, as lessee or assignee, to any lands or tenements, of whatever tenure, for the unexpired residue of a term, which was originally for not less than *sixty* years (*l*), whether determinable on life or

(*g*) Representation of the People Act, 1832, s. 18.

(*h*) Representation of the People Act, 1867, s. 5; Representation of the People Act, 1832, s. 18.

(*i*) *Nicholls* v. *Bulwer* (1870), L. R. 6 C. P. 281.

(*k*) Representation of the People Act, 1867, s. 5.

(*l*) *Trotter* v. *Watson* (1869), L. R. 4 C. P. 434; *Warburton* v. *Denton* (1870), *ib.* 6 C. P. 267.

not, is qualified to vote, if the lands are of "the clear "yearly value of 5*l.* (formerly 10*l.*) or upwards" (*m*); and where the term was originally less than sixty years but not less than twenty years, whether determinable or not, then if the lands are of the clear yearly value of 50*l.* or upwards (*n*), the person entitled thereto, as lessee or assignee, is also entitled to vote. But as regards a sub-lessee, or an assignee of an under-lease, it is required, that, in order to vote in respect of such term of twenty years, he should be also in the actual occupation of the premises (*o*). It must be noticed that, as regards joint owners, under the Representation of the People Act, 1884, s. 4, one only of such co-owners may vote, unless in the case of persons deriving title by descent, succession, marriage, marriage settlement, or will, or unless in the case of partners *bonâ fide* occupying land for partnership purposes.

In addition to the qualification of *ownership*, there was also introduced by the Representation of the People Act, 1832, the qualification of *occupation*, commonly called the *occupation franchise;* for by that Act, every one was qualified to vote at an election for the county, who occupied, *as tenant*, any lands or tenements within the county, for which he was liable to a yearly rent of not less than 50*l.* (*p*); and, formerly, under the Parliamentary Voters Registration Act, 1843, s. 73, in the case of a joint occupation, each occupier might have voted if the rent when divided by the number of the occupiers gave at least 50*l.* for each of them. By the Representation of the People Act, 1867, s. 6, every person is qualified who, *as owner or tenant*, occupies any lands or tenements within the county, of the rateable value of 12*l.* a year or upwards (*q*). And, in

(*m*) Representation of the People Act, 1867, s. 5.

(*n*) Representation of the People Act, 1832, s. 20.

(*o*) *Ibid.*

(*p*) Representation of the People Act, 1832, s. 20.

(*q*) Representation of the People Act, 1867, s. 6; *Mather* v. *Allendale* (1870), L. R. 6 C. P. 272.

the case of a joint occupation, if the rateable value, on being divided by the number of the joint occupiers, gives a similar value, each is entitled to vote, but not more than two are to vote in respect of the same premises, unless they derive their title thereto by descent, succession, marriage, marriage settlement, or devise, or unless they are partners carrying on business therein (*r*). Finally, by the Representation of the People Act, 1884, s. 2, a uniform *household franchise* and a uniform *lodger franchise* at elections, which previously existed only in boroughs, have been established in all counties and boroughs throughout the United Kingdom; and every man possessed of a household qualification, or of a lodger qualification, is entitled, if the qualifying premises are situate in a county, to be registered as a voter, and, when registered, to vote at an election for such county. The Act (s. 7) defines a household qualification as the qualification enacted for *borough* constituencies by the Representation of the People Act, 1867, s. 3 (*s*), and a lodger qualification as the qualification enacted for *borough* constituencies by s. 4 of the same Act; and by section 3 a servant or employé inhabiting offices, which his master does not inhabit, is entitled to vote as an *inhabitant occupier* of such offices (*t*). The Representation of the People Act, 1884, has also provided (ss. 5 and 6) that every man occupying any *land* in the United Kingdom of the clear yearly value of not less than 10*l.* shall be entitled to be registered as a voter, and, when registered, to vote at an election for such county in respect of such occupation. But no one is to be entitled to be registered as a county voter in respect of the occupation of any dwelling-house or land within a borough, the last-mentioned provision not

(*r*) Representation of the People Act, 1867, s. 27.

(*s*) The *borough* qualification here referred to is having (between July 31 and July 31) been an "inhabitant occupier" (whether as owner or as tenant) of any *dwelling-house* within the borough.

(*t*) As to this qualification, which is known as the *service* franchise, see *Clutterbuck* v. *Taylor*, [1896] 1 Q. B. 395.

prejudicing any then existing right. But such last-mentioned right (where it exists in any one concurrently with his right under the Act) is to merge in the right under the Act (*u*).

By the Redistribution of Seats Act, 1885, the representation of numbers has been, as nearly as may be, rendered uniform in counties, as well as in boroughs throughout the kingdom. Each of the counties at large named in the Seventh Schedule to the Act returns the number of members named in the schedule, and is divided into the same number of parliamentary divisions as the number of members, and each division returns one member (*x*). Prior to that Act certain counties and boroughs returned more than one member, *e.g.*, Yorkshire returned ten members, Lancashire eight, London four, and Manchester, Liverpool, Birmingham, and Leeds respectively three; and while that state of the representation of the counties and boroughs continued, at a contested election for any county or borough, returning three or more than three members, no person could vote for more than two candidates, or, in the city of London, for more than three (*y*). In Wales, the right of election for some of the principal towns or boroughs represented was shared by other boroughs, which were then called "contributory boroughs" (*a*). All these distinctions are, however, now superseded by reason of the one member one constituency principle; but the city of London, although it returns two members, is nevertheless not two constituencies.

Secondly, of the qualifications which belong to the electors for BOROUGHS.—[The electors of citizens and burgesses, and the representatives of the cities and towns, were supposed in law to be, or to represent, the trading

(*u*) Representation of the People Act, 1884, s. 7, sub-ss. (6), 7); and s. 10.

(*x*) Redistribution of Seats Act, 1885, s. 9.

(*y*) Representation of the People Act, 1867, ss. 9, 10.

(*a*) Parliamentary Electors Registration Act, 1868, s. 16.

[interest of the kingdom; and, inasmuch as trade was seldom long fixed in one place, it used to be left to the Crown to summon, *pro re natâ*, the most flourishing towns to send representatives to parliament, so that as towns increased in trade, and grew in population, they became, one by one, raised to the rank of parliamentary boroughs.] But many towns, which from an obscure original had risen to high importance, remained unrepresented, except as forming part of the county in which they lay (*b*); also, many towns which had lost their importance still continued to return members to the house of commons (*c*).

Accordingly, by the Representation of the People Act, 1832, a new arrangement was made, under which the representation of the trading and manufacturing interest was, in both these particulars, placed upon a different basis, no towns of conspicuous importance being then left unrepresented, while those which had fallen into comparative insignificance were deprived of their rank as parliamentary boroughs (*d*). Afterwards, by the Representation of the People Act, 1867, some further efforts were made

(*b*) See Chitty, *Prerog. of the Crown*, 67, 68; 1 Doug. *Elect.* 69.

(*c*) A few, however, had from time to time been eased of their parliamentary franchise, upon their own petition, having been desirous of avoiding the burthen then incumbent upon boroughs of paying *wages* to their representatives; which burthen also then lay upon counties,—the wages for a knight of the shire being 4*s.* a day, and for a citizen or burgess, 2*s.*,—according to the rate established in the reign of Edward the Third (Prynne, *Fourth Register of Parliamentary Writs*; Henry, *Hist. of Great Britain*, vol. iii. p. 107).

(*d*) The boroughs thus disfranchised are mentioned in the Representation of the People Act, 1832, Sched. A. In Sched. O. of the Parliamentary Boundaries Act, 1832, the different places then sending members to parliament are enumerated, and their boundaries defined. (See Parliamentary Boundaries Act, 1832, s. 35.) By the Representation of the People Act, 1867, s. 48, boundary commissioners were appointed to revise these boundaries; and a subsequent Act (the Boundary Act, 1868) settled and described (in accordance with their Report) the limits of certain boroughs, and the divisions of certain counties, for the purpose of parliamentary elections. As to *detached* parts of counties, see the Counties (Detached Parts) Act, 1844.

in the same direction, by reducing the number of members returnable for places of comparatively small population, and increasing those returnable for the more important towns, while, at the same time, certain new boroughs were created in districts hitherto insufficiently represented (*e*). And by the Redistribution of Seats Act, 1885, the representation of numbers has been, as nearly as may be, rendered uniform in boroughs, as in counties, all over the kingdom. For, first, the seventy-nine English boroughs, the two Scotch boroughs, and the twenty-two Irish boroughs mentioned in the first part of the first schedule to the Act are deprived of their representation as boroughs, and are thrown into their respective counties (*f*); and the five counties of cities or of towns (including Berwick-upon-Tweed) mentioned in the second part of the same schedule are in like manner thrown into the counties in which they are locally situate. Secondly, the city of London is reduced to returning two members only, and the thirty-six English boroughs, and three Irish boroughs, mentioned in the second schedule are each to return one member only (*g*). Thirdly, the fourteen English boroughs, three Scotch boroughs, and two Irish boroughs mentioned in the third schedule are to have an increased number of members (*h*). Fourthly, a large number of new parlia-

(*e*) By the Representation of the People Act, 1867, s. 17, any borough which, at the census of 1861, had a population of less than 10,000 was thenceforth to return not more than a single member—a provision which deprived thirty-eight boroughs of one of their members. But on the other hand, Manchester, Liverpool, Birmingham, and Leeds each thereafter returned three members instead of two (sect. 18).

(*f*) Redistribution of Seats Act, 1885, s. 2.

(*g*) Sect. 4.

(*h*) Sect. 5. That is to say, the total number of members of the specified boroughs is to be as follows:—Liverpool, nine; Birmingham, Tower Hamlets, and Glasgow, seven each; Manchester, six; Leeds and Sheffield, five each; Bristol, Edinburgh, Belfast, and Dublin, four each; Bradford, Hull, Nottingham, Salford, Southwark, and Wolverhampton, three each; and Swansea and Aberdeen, two each.

mentary boroughs has been created, those, namely, which are specified in the fourth schedule to the Act (*i*). And, fifthly, the parliamentary boroughs mentioned in the sixth schedule to the Act are divided into the parliamentary divisions specified in the same schedule, and each division is to return the number of members (usually one only) specified in the schedule (*k*).

With respect to the universities of Oxford and Cambridge, their franchise rests upon a different principle. Formerly they were not as a rule specially represented in parliament, [though once, in the twenty-eighth year of Edward the First, when a parliament was summoned to consider of the king's right to Scotland, there were issued writs which required the University of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose (*l*). It was James the First who indulged these universities with the permanent privilege of sending members of their own body to protect in the legislature the rights of the republic of letters.] A similar privilege has since been conferred on the universities of London, Dublin, Edinburgh, St. Andrews, Glasgow, and Aberdeen (*m*).

And here it may be useful, or at all events interesting, to state, as regards the right of voting in boroughs, that until the Reform Act, 1832, the right of voting for citizens and burgesses depended entirely upon the several charters, customs, and constitutions of the respective

(*i*) Sect. 6. Of these new boroughs, the most important are Bethnal Green (two members), Camberwell (three members), Finsbury (three members), Hackney (three members), Islington (four members), Lambeth (four members), St. Pancras (four members), Shoreditch (two members), and West Ham (two members).

(*k*) Sect. 8.

(*l*) 1 Prynne, *Parl. Writs*, 345.

(*m*) The universities of Edinburgh and St. Andrews send one representative, and those of Glasgow and Aberdeen another (see Representation of the People (Scotland) Act, 1868). As to London, see Representation of the People Act, 1867; and as to Dublin, see Representation of the People (Ireland) Acts, 1832 and 1868.

boroughs (*n*). This variety of qualifications, which formerly occasioned infinite disputes, was in some measure remedied by the 2 Geo. II. (1728), c. 24, 28 Geo. III. (1787), c. 52, and 34 Geo. III. (1794), c. 83, which provided, that the determination of a committee of the House of Commons, as to the right of voting for any particular place, should be thereafter conclusive on the subject for ever. Under the system established by the Representation of the People Act, 1832, the rights of voting in boroughs consisted, first, of certain antient rights reserved during the lives of those individuals who enjoyed them at the date of that Act (*o*); secondly, of certain antient rights reserved in perpetuity (*p*); and, thirdly, of certain new rights conferred by the Act. And, first, the antient rights reserved during the lives of the parties, were chiefly those which the customs of some boroughs permitted to be claimed by the *scot and lot* inhabitants (*i.e.*, such as paid the poor rate as inhabitants), or by the inhabitant householders, or by the *potwallers* (*i.e.*, such as cooked their own diet in a fireplace of their own); but the number of individuals who can claim these franchises has now become so diminished by death, as to be of little practical importance. Secondly, the antient qualifications reserved in perpetuity were those which might be claimed by reason of being a "burgess or freeman" of a parliamentary borough (*q*), and, in towns

(*n*) 1 Bl. Com. 174; Oldfield, *Representative History*, vol. iii. pp. 1, 2, 9.

(*o*) See Russell, *Reform Act*, p. 30.

(*p*) By the Honorary Freedom of Boroughs Act, 1885, persons of eminence may be admitted as honorary freemen of the borough, but not so as to acquire thereby any right of voting, parliamentary or municipal.

(*q*) It may be remarked that in the *City of London*, the qualification was being a *freeman* and *liveryman*; and the freedom of that city can be obtained in three different methods: 1. By *patrimony*, *i.e.*, as the son of a freeman born after the father has acquired his freedom; 2. By *servitude*, *i.e.*, by serving an apprenticeship of seven years to a freeman; and 3. By *redemption*, *i.e.*, by purchase. But besides being free of the city, it was requisite, in order to have a vote as a "freeman and liveryman," to be entitled to wear the *livery* of some one of

which were counties, of being a "freeholder or burgage tenant" of a holding worth 40*s*., where the tenant was in actual occupation, otherwise worth 10*l*. Thus, all who, by the custom of the place, would have been entitled to vote on these grounds if the Representation of the People Act, 1832, had not been passed, can still exercise the franchise, provided, in the case of freemen, that their title accrued on an admission prior to March, 1831, or was founded on *servitude* (*i.e.*, apprenticeship). The Act further required residence in or within seven miles of the borough (*r*). Thirdly, the new rights conferred by the Act were in respect of the occupation within a parliamentary borough, either as owner or as tenant, *of any house, warehouse, counting-house, shop, or other building*, being either separately of the clear yearly value of not less than 10*l*. (*s*), or of that value jointly with land in the same borough, occupied by the same party as owner, or as tenant under the same landlord (*t*). But to this latter qualification (which was usually called the "borough occupation franchise," to distinguish it from the "county occupation franchise" above referred to) certain restrictions were annexed. The voter must have occupied the same building, or some other building in the borough of the required value in immediate succession (*u*), for *twelve* calendar months next previous to the last day of July in the year in which he claimed to be registered (*v*). He must, during such period of occupation, have been rated

the companies, guilds, or fraternities of which the corporation of the city of London consists; and the power of calling to the livery is vested in the court or ruling body of the particular company. (See 2 Brownl. 286; Minutes of Common Council, 9th March, 1836; Pulling, *Customs of London*, 81; and, as to making out the lists of liverymen, see Parliamentary Voters Registration Act, 1843, s. 20.)

(*r*) Representation of the People Act, 1832, ss. 18, 31, and 32.

(*s*) As to what is included under the words *house*, *&c.*, see the Parliamentary and Municipal Registration Act, 1878, s. 5; *Piercy* v. *Maclean* (1870), L. R. 5 C. P. 252.

(*t*) Representation of the People Act, 1832, s. 27.

(*u*) Sect. 28.

(*v*) Now the 15th of July: Parliamentary and Municipal Registration Act, 1878, s. 7.

to all the poor rates of the place (*x*). He must, on or before the 20th of July in that year, have paid up all the poor rates and assessed taxes which had become payable by him, in respect of the premises, before the 6th of April then last (*y*). He must have resided for six calendar months next previous to the last day of July in the same year, within the borough, or within *seven* statute miles thereof (*z*).

Such were the qualifications for borough electors under the Representation of the People Act, 1832, and such they remained for a period of thirty-five years ; but in the year 1867 the legislature, at the same time that it effected the alterations in the county franchise, and the partial redistribution of seats, both for counties and boroughs, already mentioned, modified also the borough franchise, by adding two fresh qualifications, namely, *the household and the lodger franchise*. A person becomes entitled to the household franchise as being "an inhabitant occupier," either as owner or tenant, of *any dwelling-house* (*a*) within the borough, such occupation having been a sole, and not a joint, occupation, and having continued for the whole of the twelve months preceding the fifteenth day of July in any year (*b*), and

(*x*) See Representation of the People Act, 1867, s. 7 ; the Poor Rate Assessment and Collection Act, 1869 ; Assessed Rates Act, 1879 ; *Stamper* v. *Overseers of Sunderland* (1868), L. R. 3 C. P. 388.

(*y*) Representation of the People Act, 1832, s. 27 ; now 5th of January (Parliamentary Elections Act, 1848).

(*z*) See Representation of the People Act, 1832, s. 27 ; now 15th of July (Parliamentary and Municipal Registration Act, 1878, s. 7).

(*a*) As to what is included under the term "dwelling-house," see Parliamentary and Municipal Registration Act, 1878, s. 5 ; *Thompson* v. *Ward* (1871), L. R. 6 C. P. 327 ; *Clutterbuck* v. *Taylor*, [1896] 1 Q. B. 395. By the House Occupiers Disqualification Removal Act, 1878, a man may be registered and vote, though, during a part of the qualifying period, *not exceeding four months in the whole*, he shall, by letting or otherwise, have permitted the qualifying premises to be occupied as a furnished house by some other persons ; and, by the Electoral Disabilities Removal Act, 1891, although he may have been absent or out of residence, on official business, for the like period.

(*b*) Parliamentary and Municipal Registration Act, 1878, s. 7.

the voter must during such period have been rated in respect of the premises to all the poor rates, if any, and have on or before the 20th of July in the same year, paid all of the same rates which became payable up to the preceding 5th day of January (*c*). Since 1878 (*d*) the dwelling-house need not have been *separately* rated, and an occupier does not lose his vote by reason of having compounded with the owner as to payment of rates. The *lodger franchise* belongs to a person who, as lodger, has occupied in the borough, and resided in, as sole tenant, for the twelve months preceding the fifteenth day of July in any year, the same lodgings (which, since 1878, includes different lodgings in the same dwelling-house) of a clear yearly value, if let unfurnished, of ten pounds or upwards, and who has claimed to be registered as a voter at the next ensuing registration of voters (*e*). The occupation may be joint, provided the total value amounts to 10*l*. for each joint occupier.

It is in all cases a condition precedent to the right of voting, that the voter shall have been first duly *registered* as such (*f*).

The present system of registration, which depends on the Registration Act, 1885, and is the same for counties and boroughs, is shortly as follows. On or within seven days after the 15th of April in each year, the clerk of the county council in a county, and the town clerk in a borough, send to the overseers of the poor of every parish and township precepts to make out lists of persons having a right to vote within their several areas. In accordance with these precepts the overseers make out

(*c*) Representation of the People Act, 1867, s. 3; *Brewer* v. *M'Gowen* (1869), L. R. 5 C. P. 239; *Smith* v. *Lancaster*, *ib.* 246.

(*d*) Parliamentary and Municipal Registration Act, 1878, s. 14.

(*e*) Representation of the People Act, 1867, s. 4; Parliamentary and Municipal Registration Act, 1878, ss. 6, 7, 22.

(*f*) Representation of the People Act, 1832, s. 26; Parliamentary Voters Registration Act, 1843, s. 2; County Voters

lists of voters according to their several qualifications, and publish the same on the 1st of August, except that the list of those claiming to be registered as occupation voters, and the list of lodgers claiming to be registered for the first time or under a new qualification, are not published till the 25th of August. Subsequently, between the 8th of September and the 12th of October, the several lists, together with the register of the preceding year, are examined into by *revising barristers* appointed for the purpose (*g*), who hold open courts in order to determine, in every case of objection, the validity of the lists, and from whose decision on any point of law there is an appeal to the King's Bench Division (*h*). These lists and registers, when corrected, are transmitted by the revising barristers to the clerk of the county council in the case of counties, and to the town clerk in the case of boroughs. The lists are then printed into a book (*i*), which book thereupon becomes the *register* of the electors for the county or borough for the succeeding year (*k*). It is provided, however, that

Registration Act, 1865; Representation of the People Act, 1867, ss. 3—6, &c.

(*g*) Under the Parliamentary and Municipal Registration Act, 1878, it is provided that where the whole or part of the area of a municipal borough is co-extensive with or included in the area of a parliamentary borough, the lists of parliamentary voters and the "burgess lists" shall, as far as practicable, be made out and revised together (ss. 15, 28).

(*h*) As to the appeal, see Parliamentary and Municipal Registration Act, 1878, s. 37; and Supreme Court of Judicature Act, 1881, s. 14. As to the appointment of "revising barristers," their duties, etc., and appeals from them, and as to assistant revising barristers, see Parliamentary Voters Registration Act, 1843, ss. 28 *et seq.*; County Voters Registration Act, 1865; Revising Barristers Acts, 1866, 1873, 1874; Parliamentary and Municipal Registration Acts, 1878 and 1886; and County Electors Act, 1888, ss. 9, 10; *Willis* v. *Maclachlan* (1876), 1 Ex. D. 376. And as to the expenses of elections, see Municipal Registration Act, 1878, s. 30; County Electors Act, 1888, s. 8; and Registration of Electors Act, 1891.

(*i*) Parliamentary Voters Registration Act, 1843, s. 47.

(*k*) *Ibid.*, s. 49; and see Registration of County Electors (Extension of Time) Act, 1889 (a temporary Act).

(subject to an exception presently to be mentioned), no person shall be so registered in any year, as a freeholder, copyholder, customary tenant, or tenant in antient demesne, unless he shall have been in the actual possession of the property in respect of which he claims, or in the receipt of the rents and profits thereof for his own use, for *six calendar months* at least, next previous to the fifteenth day of July in such year (*l*) ; nor as leaseholder, assignee, or occupying tenant at the rent of 50*l.* or upwards, unless he shall have been in such receipt, possession, or occupation, as the case may require, for *twelve* calendar months next previous to such date (*m*). But this is subject to the exception just referred to, viz., that if the lands or tenements entitling such owner, holder, or occupier to vote, shall have come to the person claiming to be registered, at any time within these respective periods, by descent, succession, marriage, marriage settlement, devise, or promotion to any benefice in a church, or by promotion to any office, he may claim to have his name inserted as a voter in the then next lists, and be registered accordingly, no length of possession or receipt of profits being in that case required (*n*). Moreover, with regard to the franchise acquired (under the Representation of the People Acts, 1867 and 1884) by the occupation, as owner or tenant, of lands or tenements of the qualifying value, it is required that the party shall during the preceding twelve months have been rated to all poor rates, if any, made in respect of the premises, and shall, before the 20th July in the

(*l*) Representation of the People Act, 1832, s. 26 ; see Representation of the People Act, 1867, s. 5 ; Parliamentary and Municipal Registration Act, 1878, s. 7 ; Registration Act, 1885, s. 12.

(*m*) By the Parliamentary Voters Registration Act, 1843, s. 73, tenant occupiers might vote for the *county* in respect of *different* premises occupied in immediate succession for the twelve calendar months,—a provision which, by the Representation of the People Act, 1867, s. 26, was extended to the occupation of *different* premises in immediate succession in *boroughs*.

(*n*) Representation of the People Act, 1832, s. 26.

same year, have paid *all* the rates which became payable up to the preceding 5th January. We may add to the foregoing remarks, that a person once entered on the register need, as a rule, make no fresh claim for any succeeding year, so long as the nature of his qualification and his place of abode remain the same (*o*); but in the case of a lodger the claim to be registered is an essential part of the qualification, and accordingly a fresh claim must be made every year (*p*).

Such is the substance of the present law with respect to the qualification of electors for counties and for boroughs generally considered; and it remains only to notice certain electoral incapacities and restrictions. And first, no vote can be given by any woman (*q*); nor by any but a man of full age (*r*), not subject to any legal incapacity, such, for example, as arises from being a lunatic, idiot, or outlaw in a criminal suit (*s*), or from having been convicted of felony (*t*), bribery, treating, or undue influence at any election (*u*). Secondly, no person can vote in right of any estate conveyed to him for the purpose of conferring the franchise, if made subject to a condition for defeating the conveyance when that object is accomplished; and any person who executes or prepares the conveyance, or gives his vote under it, is made liable to forfeit 40*l*. (*v*). Thirdly,

(*o*) Parliamentary Voters Registration Act, 1843, ss. 5, 6, 79.

(*p*) *Hersant* v. *Halse* (1886), 18 Q. B. D. 412.

(*q*) See Representation of the People Act, 1832; *Chorlton* v. *Lings* (1868), L. R. 4 C. P. 374. Women may vote in Municipal Elections (Municipal Corporations Act, 1882, s. 63); also in County Council Elections (Local Government Act, 1888, s. 2); also in Parish Council Elections (in respect of occupation, but not in respect of ownership) (*Drax* v. *Ffooks*, [1896] 1 Q. B. 238; Local Government Act, 1894, ss. 2, 43).

(*r*) 7 & 8 Will. 3 (1696), c. 25, s. 8.

(*s*) Rogers, *Elect.* (15th ed.), pp. 171, 186.

(*t*) But a *pardon*, or the endurance of the punishment, restores competency. (See Rogers, p. 180.) *Secus*, as to convict with ticket of leave. (See Penal Servitude Act, 1864.)

(*u*) Corrupt and Illegal Practices Prevention Act, 1883, ss. 6, 10.

(*v*) Elections (Fraudulent Conveyances) Act, 1711, s. 1.

only one person can be admitted to vote in respect of the same house or tenement (*x*). But this is only when a splitting of interests is made for election purposes, and in order to multiply votes, as by the creation of "faggot votes"; and the restriction consequently extends not to cases of *bonâ fide* joint occupation or tenancy, nor to cases where there is a division by operation of law, as in descents (*y*), nor to the lodger franchise conferred by the Representation of the People Act, 1867, nor to the household qualification conferred by the Representation of the People Act, 1884. Fourthly, no peer, other than an Irish peer actually elected to the House of Commons, can be allowed to vote at any election (*z*). Fifthly, no metropolitan police magistrate can vote within his jurisdiction (*a*). Sixthly, no person may be registered in any year as a voter in the election for a county (*b*), city, or borough, who shall, within the twelve calendar months next previous to the 15th day of July in that year, have received parochial

(*x*) 7 & 8 Will. 3 (1696), c. 25, s. 7; the Parliamentary Elections Act, 1813. The practice of splitting votes for election purposes was not in modern times viewed with jealousy (Rogers, *Elect.* p. 202); but "faggot votes" have now been effectually abolished by the Representation of the People Act, 1884, s. 4.

(*y*) *Ibid.*

(*z*) See Rogers, *Elect.* p. 186; 13 Com. Journ. 14 December, 1699. This point was again so decided by the Common Pleas in the year 1872, on a claim to vote advanced by Lord Beauchamp. See *Earl Beauchamp v. Overseers of Madresfield* (1872), L. R. 8 C. P. 245.

(*a*) Metropolitan Police Courts Act, 1839, s. 6. There used to be a similar incapacity attaching to members of the metropolitan police force (Metropolitan Police Act, 1828, s. 18); to the police of the city of London (2 & 3 Vict. c. xciv. s. 7), and to the rural police (County Police Act, 1839, s. 9). But all these incapacities have now been removed by the Police Disabilities Removal Act, 1887. At one time, all *persons employed in the collection or management of the revenues of the Crown* were also disqualified; but the enactments on this subject were repealed by 31 & 32 Vict. (1868), c. 73, and 37 & 38 Vict. (1874), c. 22.

(*b*) Representation of the People Act, 1867, s. 40. Prior to this enactment, disqualification by reason of the receipt of parochial relief, did not apply in the case of a *county* voter.

relief, or disqualifying alms (*c*). Seventhly, no person can vote at a *county* election in right of freehold, copyhold, or leasehold premises, the occupation of which would, either separately or jointly with land occupied therewith, confer a vote, in respect of the representation of any parliamentary *borough* under the Representation of the People Act, 1832, s. 27 (*d*); and this whether the right to vote for such borough, in respect of such building, shall have been actually acquired or not. But this must now be understood only of such boroughs as are not thrown into any "parliamentary county" (*e*).

2. As to the qualification of the ELECTED.—As regards the persons *to be elected* members of the house of commons, there are certain disqualifications, some of which depend upon the law and custom of parliament, declared by the house of commons itself, while others depend upon particular statutes (*f*); and, again, some are in respect of personal incapacity or misconduct, and others in respect of holding some office or employment considered to be incompatible with a seat in parliament.

And first, among those who are disqualified in respect of personal incapacity are English and Scotch peers (*g*); infants (*h*),—a disqualification not infrequently disregarded before the Reform Act, 1832, although made statutory in

(*c*) Representation of the People Act, 1832, s. 36; Parliamentary and Municipal Registration Act, 1878, ss. 7, 12. As to the nature of the alms the reception of which disqualifies, see *R.* v. *Halesworth* (1832), 3 B. & Ad. 717, and *Harrison* v. *Carter* (1876), 2 C. P. D. 26; *Case of the Borough of Hedon*, 25 Com. Journ. 275. *Medical* relief is no longer a disqualification (Medical Relief Disqualification Removal Act, 1885).

(*d*) *Chorlton* v. *Johnson* (1868), L. R. 4 C. P. 426.

(*e*) Representation of the People Act, 1832, ss. 24, 25.

(*f*) 1 Bl. Com. p. 175; 4 Inst. 47, 48.

(*g*) But an Irish peer is eligible, unless he has been previously elected to serve in the House of Lords as a representative peer (The Union with Ireland Act, 1800, Art. 4).

(*h*) *Vide sup.* p. 394, note (*r*).

1696 (*i*),—women (*k*), lunatics, and idiots (*l*); persons who have been convicted of treason or felony, or have been outlawed in a criminal prosecution (*m*)—it will be observed that this does not apply to persons convicted of *misdemeanours*, but in such cases the house may resort to its power of expulsion;—and formerly notorious atheists would also appear to have been disqualified, but this can no longer be considered to be the case since the Oaths Act, 1888 (*n*). As regards lunatics, the house of commons would not vacate a seat for lunacy except it were incurable; but now, by the Lunacy (Vacating of Seats) Act, 1886, it is provided that any member of the house of commons becoming a lunatic and being received into an asylum or house for lunatics may be visited by the Lunacy Commissioners and examined and, after six calendar months, again visited and examined by them; and if they report on each occasion that he is or continues a lunatic, his seat thereupon becomes vacant. Also, under the Corrupt Practices Act, 1883, any candidate reported by the election court to have known of and consented to the commission of corrupt practices other than undue influence or treating at an election, or found guilty of treating or undue influence, is disqualified from serving in the house of commons for the period of seven years, and from serving at any time for the constituency in question (*o*). Under the law of bankruptcy, when any member of the house of commons was adjudged bankrupt under the Bankruptcy Act, 1869, he was thereby incapacitated for the space of one year from sitting or voting, unless the order of adjudication was

(*i*) Cf. the cases of Charles James Fox and Lord John Russell (7 & 8 Will. III., c. 25, s. 8).

(*k*) *Beresford-Hope* v. *Lady Sandhurst* (1889), 23 Q. B. D. 79.

(*l*) Com. Journ. 1623, 1625; Com. Dig. *Parliament*, D. 9; Sheph. *Elect.* 109.

(*m*) Rogers, *Elect.* (17th ed.), vol. ii. p. 31; Forfeiture Act, 1870, s. 2.

(*n*) *Att.-Gen.* v. *Bradlaugh* (1885), 14 Q. B. D. 667.

(*o*) Corrupt and Illegal Practices Prevention Act, 1883, ss. 4, 6. See p. 411, *infra*.

annulled, or his creditors were fully paid or satisfied; and if at the expiration of such period the order was not annulled or his debts were not paid, his seat became vacant (*p*). But now, under the Bankruptcy Act, 1883, a debtor adjudged bankrupt cannot be elected to, or sit or vote in the house of commons, unless and until his adjudication is annulled, or unless he obtains his discharge, together with a certificate that his bankruptcy was caused by misfortune, and not by misconduct (*q*).

Secondly, among the *offices* and occupations or employments which incapacitate for a seat in parliament, and which are too numerous for complete enumeration in this work, we may specify the following persons who are disqualified on this ground:—judges of the superior courts in England (*r*), or Ireland (*s*), or of the Court of Session or Exchequer in Scotland (*t*); judges of the English county courts (*u*); officers of any court having jurisdiction in bankruptcy (*v*); clergy of the Established Church of England (unless they have renounced their orders under the Clergy Disabilities Act, 1870), or ministers of the Scottish Church, or of the Church of Rome (*x*); metropolitan police magistrates (*y*); and (within their respective jurisdictions) sheriffs of counties, returning officers of

(*p*) *Ex parte Pooley, In re Russell* (1872), L. R. 7 Ch. App. 519.

(*q*) Sect. 32.

(*r*) Com. Journ. 9th Nov. 1605; Judicature Act, 1875, s. 5.

(*s*) Supreme Court of Judicature (Ireland) Act, 1877, s. 13.

(*t*) Parliamentary Elections (Scotland) Act, 1733, s. 4.

(*u*) County Courts Act, 1888, s. 8.

(*v*) Bankruptcy Act, 1883, s. 116.

(*x*) House of Commons (Clergy Disqualification) Act, 1801, s. 4; Roman Catholic Relief Act, 1829, s. 9. Upon the controverted question as to the eligibility of clergymen prior to the House of Commons (Clergy Disqualification) Act, 1801, Blackstone inclined to the negative, assigning as the reason that the beneficed clergy are represented in *convocation*. But this reason, as has been justly remarked, is not satisfactory; and the authorities were on the whole in favour of their eligibility. (*Case of the Borough of Newport* (1785), 2 Luder, 269.)

(*y*) Metropolitan Police Act, 1829, s. 18; 3 & 4 Will. 4 (1833), c. 19, s. 19.

boroughs (*z*), recorders (*a*), and revising barristers (*b*). To this list we may add any person who holds any new office or place of profit under the Crown, created since 25th October, 1705 (*c*); and any person who holds a royal pension, either during pleasure or for a term of years (*d*). Moreover, by the House of Commons (Disqualification) Act, 1782, a disqualification attaches to persons holding any contract with government on account of the public service (*e*). But as to these there is an exception in the case of members of an incorporated trading company: and also a provision, that where the completion of any contract shall devolve on any person by descent or limitation, will, or marriage, the incapacity shall not attach until twelve calendar months after he shall have become interested in such contract. Finally, by the Succession to the Crown Act, 1707, s. 26, any person already chosen a member of parliament, not being an officer in the army or navy accepting a new commission, who accepts any office of profit from the Crown, is made to

(*z*) Bro. Ab. tit. *Parliament*, 7; 4 Inst. 48; Whitelocke, *Parl.* ch. 99, 100, 101; Com. Journ. 25th June, 1604; 14th April, 1614; 22nd March, 1620; 2nd, 4th, and 15th June, 17th Nov. 1685; Rogers, *Elect.*, vol. ii. p. 5. As to sheriffs substitute in Scotland, see Sheriffs (Scotland) Act, 1747, s. 11; Representation of the People (Scotland) Act, 1832, s. 36.

(*a*) Municipal Corporations Act, 1835, s. 103.

(*b*) Parliamentary Voters Registration Act, 1843, s. 29.

(*c*) Succession to the Crown Act, 1707, s. 25; House of Commons Disqualification Act, 1741; Civil List and Secret Service Money Act, 1782; Public Officers (Ireland) Act, 1817; 57 Geo. 3, cc. 63, 84; and (Irish Act) 33 Geo. 3 (1793), c. 41. By the House of Commons (Disqualification) Act, 1801, persons ineligible for England or Ireland were disqualified for the united parliament.

(*d*) Succession to the Crown Act, 1707, and Crown Pensioners Disqualification Act, 1715. See 22 & 23 Vict. c. 5 (1859), with regard to the eligibility of persons holding certain *diplomatic* pensions; and the Pensioners Civil Disabilities Relief Act, 1869, as to persons who hold *civil service* pensions or *superannuation allowances*.

(*e*) As to this provision, see Rogers, *Elections*, vol. ii. p. 26, and *Royse* v. *Birley* (1869), L. R. 4 C. P. 296.

vacate his seat thereby, though, if the office is one created prior to 25th of October, 1705, he is rendered capable of being re-elected; but the Representation of the People Act, 1867, s. 52, provided that no vacation of the seat or necessity for re-election should arise where a member had been returned since his acceptance of any of the offices mentioned below, merely by reason of his subsequent acceptance of some other office in that list in immediate succession the one to the other (*f*).

Subject to these standing restrictions and disqualifications, every subject of the realm is now eligible as a member of the house of commons. But Blackstone (*g*) mentions certain now obsolete requirements for eligibility, of which one was that all members should be inhabitants of the places for which they were chosen (*h*). This rule, however, was practically disregarded as early as Elizabeth and was at length entirely repealed in 1774 (*i*). Qualifications were, up to a much more recent period, required in regard to *property*, the changes on which subject have been as follows. Formerly (*k*), the provision was, that all knights of the shire should either be actual knights, or "such notable esquires and gentlemen as have estates "sufficient to be knights, and by no means of the degree

(*f*) The following are the offices referred to in the text: Lord High Treasurer; Commissioner for executing the offices of Treasurer of the Exchequer of Great Britain and Lord High Treasurer of Ireland; President of the Privy Council; Vice-President of the Committee of Council for Education; Comptroller, Treasurer, and Vice-Chamberlain of his Majesty's Household; Equerry or Groom in Waiting on his Majesty; any Principal Secretary of State; Chancellor and Under Treasurer of her Majesty's Exchequer; Paymaster-General; Postmaster-General; Lord High Admiral; Commissioner for executing the office of Lord High Admiral; Commissioners of his Majesty's Works and Public Buildings; President of the Board of Trade; Chief Secretary for Ireland; Poor Law Commissioner; Chancellor of the Duchy of Lancaster; Judge Advocate-General; Attorney-General for England or Ireland; Solicitor-General for England, Scotland, or Ireland; Lord Advocate for Scotland.

(*g*) Vol. i. p. 175.

(*h*) 1 Hen. 5 (1413), c. 1.

(*i*) 14 Geo. 3, c. 58.

(*k*) See 23 Hen. 6 (1445), c. 14.

"of yeomen." Afterwards the qualification was made to consist (without regard to rank or title) simply in real estate, which by the 9 Anne (1710), c. 5, was fixed at 600*l.* per annum of freehold or copyhold estate for a county member, and 300*l.* of the like estate for a burgess. Afterwards it was, by 1 & 2 Vict. (1838), c. 48, made to consist of the like value in *real* estate in these several cases, but with the admission of *personal* estate, or of real and personal combined, as an equivalent; and since the 21 & 22 Vict. (1858), c. 26, all property qualification has been dispensed with. The Municipal Corporations Act, 1882 (s. 11), makes the like dispensation regarding municipal officers.

There have also been instances wherein persons in particular circumstances have forfeited the common right of eligibility, being declared ineligible for that parliament by a vote of the house, or for ever ineligible by an act of the legislature (*l*). By a statute of 1372 lawyers practising in the King's Courts were disqualified from sitting as knights of the shire (*m*), but apparently with little effect; and the king's writs for the Parliament holden at Coventry, in the sixth year of Henry the Fourth, contained a fresh prohibition (grounded on an ordinance of the House of Lords, and rightly attacked as unconstitutional), that no apprentice or other man of the law should be elected a knight of the shire therein (*n*). Our legal historians have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament (*o*), Sir Edward Coke observing that there was never a good law made thereat (*p*). The Act of 1372 remained on the Statute Book till 1871 (*q*), though long previously inoperative.

3. The third point, regarding elections, is the method of proceeding therein (*r*), a matter which is regulated by

(*l*) 7 Geo. 1 (1720), st. 1, c. 28.
(*m*) 46 Ed. 3.
(*n*) Pryn. *Plea for Lords*, 379; 2 Whitelocke, 359, 368; Pryn. on 4 Inst. 13.
(*o*) Walsingh. A.D. 1405.
(*p*) 4 Inst. 8.
(*q*) Statute Law Revision Act, 1871.
(*r*) Com. Dig. *Parl.* D. 11.

the law of parliament and by the statutes which have been from time to time passed on the subject; and we shall give here some account of the method of proceeding in England and Wales (*s*). As soon as the parliament is summoned, the lord chancellor, on behalf of the Crown, sends his warrant to the clerk of the crown in chancery; who thereupon issues out writs to the proper "returning officer" of each county or borough, that is to say, as the general rule, to the sheriff in the case of a county, and to the mayor in the case of an incorporated borough, commanding such officer to proceed in due course to the election (*t*). And the returning officer must, in the case of a county election, within two days after the day on which he receives the writ, and in the case of a borough election, either on the same day or on the day following that on which he receives the writ, give public notice at some time between the hours of 9 A.M. and 4 P.M. of the day and place of election, or for the poll if the election is a contested one, and of the time and place where forms of nomination papers may be obtained (*u*). Such day of election in the case of a county or district borough must not be later than the ninth day (and in the case of other boroughs than the fourth day), after that on which the writ is received; and the place of election must be some convenient room in the town wherein the same is to be held. By the Elections (Hours of Poll) Act, 1885, the hours of polling are now from eight o'clock in the forenoon to eight o'clock in the evening in all cases.

(*s*) The principal statute now in force is the Ballot Act, 1872.

(*t*) The expenses and charges of the returning officer at a parliamentary election, are regulated and controlled by the Parliamentary Elections (Returning Officers) Act, 1875, as amended by the Parliamentary Elections (Returning Officers) Act, 1885; and under these Acts he is also entitled to require security to be given by the candidate, for the charges which may become payable under the Act. An attempt has been made by the Parliamentary Elections (Returning Officers) Act (1875) Amendment Act, 1886, to control the amount of these expenses, and to provide for the taxation thereof.

(*u*) Ballot Act, 1872, First Sched. (2).

A candidate for election is nominated in writing subscribed by two registered electors of the county, or borough, as proposer and seconder, and by eight other registered electors as assenting to the nomination (*x*); and if, at the expiration of one hour after the time appointed for the election, no more candidates stand nominated than there are vacancies to be filled up, such candidates are returned to the clerk of the crown in chancery as having been duly elected. But otherwise the returning officer must adjourn the election until a future day, on which the poll is taken in due course (*y*).

Up to a comparatively recent period, the poll in a contested election was taken by each voter openly stating at the polling booth the name of the candidate for whom he intended to vote; but, in the hope of diminishing the temptation to corrupt voting and its attendant evils, an important change was made by the Ballot Act, 1872, which, although passed only for a period of six years (*z*), has been continued by successive Expiring Laws Continuance Acts, and is still in force. By the provisions of the Act, in the case of a poll at an election, the votes are now given *by ballot* (*a*), that is to say, by each voter handing in a ballot paper previously supplied to him, whereon are inscribed the names of each candidate, against one or more of whom, as the case may require, the voter secretly puts a mark and then places the paper in a closed box (*b*). This ballot box having been taken charge of and examined by the returning officer, the result of the poll is ascertained by his counting the votes given to each candidate, and he then returns the name of such candidate or candidates, as the case may be, to whom the majority of votes have been given, to the clerk of the crown in chancery (*c*); and, in the case of an

(*x*) Ballot Act, 1872, s. 1.

(*y*) *Ibid.* As to the polling districts, see s. 5.

(*z*) Sect. 33.

(*a*) Sect. 2.

(*b*) *Ibid.*

(*c*) *Ibid.* It may be here observed, that the system of voting provided by the Ballot Act, 1872, for parliamentary elections is, by

equality of votes, but not otherwise, the returning officer, if himself a duly registered elector, may give a vote (*d*).

Such is the course of proceeding for the purpose of a general election upon the summoning of a new parliament. In the case of a particular vacancy, by death or otherwise, in an existing parliament, the course as regards the election for the particular place is the same, except that the warrant for the writ is given by the speaker, acting by order of the house, or (supposing the vacancy to occur during a prorogation or adjournment) by the speaker without any such order (*e*).

As to the elections for the Universities, whether of England, Scotland, or Ireland (to which the provisions of the Ballot Act as to the manner of voting do not apply), it has been provided by the University Elections Act, 1861, and other Acts, that any elector therein shall be at liberty to record his vote without personal attendance at the poll, by means of a *voting paper*, signed by him and delivered on his behalf, to the Vice-Chancellor (*f*), or to his deputy, at one of the appointed polling places (*g*), by some other elector of the same university, previously nominated for that purpose by the elector so voting (*h*); but the polling at any election for any of the Universities is not to continue for more than five days at the most (*i*).

the same statute (s. 20) applied also to contested *municipal* elections. And see Part III. of the Municipal Corporations Act, 1882, on which depends the law regulating municipal elections in England; *Pickering* v. *James* (1873), L. R. 8 C. P. 489. The Act of 1882 may be applied to Ireland by Order in the Council of the Lord Lieutenant (Local Government (Ireland) Act, 1898, s. 104).

(*d*) Sect. 2.

(*e*) Recess Elections Act, 1784; Bankruptcy Act, 1883, s. 33; Election of Members during Recess Act, 1858; Elections in Recess Act, 1863.

(*f*) University Elections Acts, 1861 and 1868; Representation of the People Act, 1867, s. 41.

(*g*) As to the polling places for the Universities of Oxford and Cambridge, see Parliamentary Elections Act, 1853, s. 5.

(*h*) See Universities Election Act, 1868.

(*i*) Parliamentary Elections Act, 1853, s. 4; Representation of the People Act, 1867, s. 43.

Besides the points hitherto noticed, there are some others which require attention, and which are common to all elections in England or Wales, whether for counties or boroughs, namely, the following :—

1. While no one is competent to vote unless his name appears on the register of electors (*k*), the law does not permit the qualification of any person, who has been so registered, to be questioned at the time of polling (*l*) ; and no inquiry whatever is allowed to be made on that occasion relative to the right of any person to vote, except only that the sheriff or other returning officer shall, if required on behalf of any candidate to do so, put to the voter at the time of tendering his vote, and not afterwards, either or both of two questions, worded in such manner as the Act of Parliament in that behalf prescribes (*m*). The object of these questions is to ascertain, first, the identity of the proposed voter with the registered person in respect of whose qualification he proposes to vote ; and, secondly, that the proposed voter has not already voted at that election (*n*). The voter may, upon the like requisition, be put to his oath upon these matters (*o*) ; but the law provides, that no person claiming to vote shall be excluded from doing so, unless it appears upon his answers to the questions, that he is not entitled to vote, or unless he refuses to take such oath (*p*).

(*k*) Ballot Act, 1872, s. 7.

(*l*) Parliamentary Voters Registration Act, 1843, s. 79 ; *Pryce* v. *Belcher* (1846), 3 C. B. 58 ; (1847) 4 C. B. 866 ; *Stowe* v. *Jolliffe* (1874), L. R. 9 C. P. 734.

(*m*) Parliamentary Voters Registration Act, 1843, s. 81. Analogous regulations are made for the university elections, with reference to objections to *voting papers*. (See University Elections Act, 1861.)

(*n*) *R.* v. *Thwaites* (1853), 1 El. & Bl. 704 ; The Ballot Act, 1872, First Sched. (27) ; and Redistribution of Seats Act, 1885, s. 13 (4).

(*o*) Parliamentary Voters Registration Act, 1843, s. 81. By 2 Geo. 2 (1729), c. 24, and 43 Geo. 3 (1803), c. 74, an oath in regard to *bribery* also might be put to the voter ; but these enactments have been repealed. (See Corrupt Practices Prevention Act, 1854, Sched. A. ; Ballot Act, 1872, 4th Sched.)

(*p*) *R.* v. *Harris* (1835), 7 Car. & P. 253 ; *R.* v. *Dodsworth* (1837),

2. Though no person can vote unless his name be on the register, yet a person who has been excluded therefrom by the decision of the revising barrister, may nevertheless tender his vote at the election ; and the returning officer is bound to enter it in the poll book as having been tendered, distinguishing, however, all votes so claimed from votes admitted. In the event of a petition complaining of an undue election or return, the correctness of the register, either as to votes excluded or admitted, may be impeached before the judge before whom the trial of the petition is conducted ; and the vote may be either allowed or rejected on the scrutiny, and the poll altered accordingly (*q*).

3. Moreover, as it is essential to the very being of parliament that elections should be absolutely free, all undue influences upon the electors are illegal, and strongly prohibited (*r*). It is accordingly provided, that on every day appointed for the nomination, or for the election, or for taking the poll for the election, of a member to serve in parliament, no soldier, within two miles of the city, borough, or place where the nomination or election is to be declared or poll taken, shall be allowed to go out of the barracks or quarters in which he is stationed, unless for the purpose of mounting or relieving guard, or for giving his vote at such election. And every soldier allowed to go out for any such purpose, within the limits aforesaid, must return to his barracks or quarters with all convenient speed, as soon as his guard shall have been relieved or vote tendered. But these provisions do not apply in the case of soldiers attending as guards to his Majesty or any of the royal family, or in the case of soldiers usually stationed within the Bank of England (*s*).

8 Car. & P. 218; Parliamentary Voters Registration Act, 1843, s. 82; Ballot Act, 1872.

(*q*) Rules made under the Parliamentary Elections Act, 1868, s. 25; *Ryder* v. *Hamilton* (1869), L. R. 4 C. P. 559.

(*r*) The Bill of Rights, 1689; 9 Com. Journ. 191; 17 Com. Journ. 507.

(*s*) Parliamentary Elections (Soldiers) Act, 1847. The rule formerly was, that, as soon as the time and place for the election

It has also been resolved, by vote of the house of commons, that no lord of parliament, or lord lieutenant of a county, has any right to interfere in the election of commoners (*t*); and by the 2 W. & M. (1690), c. 7 (*u*), the lord warden of the Cinque Ports was prohibited from recommending any members there. Officers of the excise, customs, stamps, and certain other branches of the revenue, as well as justices and officers appointed under the Metropolitan Police Acts, are also expressly prohibited, under heavy pecuniary penalties and loss of office, from any interference (*x*). Moreover, riots have been frequently held to make an election void; and by the Reform Act, 1832, it was provided, that where, at any place of election, the proceedings were interrupted by riot, or open violence, the sheriff or other returning officer should adjourn the poll at such place till the following day, and, if necessary, should then further adjourn the same until the interruption should have ceased (*y*).

While the electors were thus secured against violence at elections, and against other such external interferences with the exercise of the right of voting, they remained open to the internal dangers of what have been called "*the infamous practices of bribery and corruption;*" and careful provision has from time to time been made by parliament to check these insidious influences. Bribery at elections was an offence even at the common law, and punishable with fine and imprisonment (*z*); but, for the

were fixed, all soldiers quartered in the place were to remove at least one day before the election to the distance of two miles or more, and not to return till one day after the poll was ended. (8 Geo. 2 (1735), c. 30.) But this enactment, being found inconvenient, is now repealed by the statute above cited.

(*t*) As to the legal effect of the sessional order of the House of Commons, see Anson, *Law and Custom of the Constitution*, i., p. 119, n.

(*u*) Repealed by Statute Law Revision Act, 1867.

(*x*) Metropolitan Police Courts Acts, 1829, s. 18, and 1860, s. 5.

(*y*) Representation of the People Act, 1832, s. 70.

(*z*) 3 Burr. 1335, 1359; 4 Doug. 292. Blackstone says (vol. i. p. 179), that the first instance

more easy repression of bribery and of other cognate offences, specific provision has, from time to time, been made by certain Acts of Parliament. It is convenient shortly to state these provisions here.

First, by the Corrupt Practices Prevention Act, 1854 (*a*), the three following offences were prohibited, namely:—(1) *Bribery*, which is defined as the gift or promise of money for valuable consideration, or the gift procurement or promise of any office place or employment, both as regards him from whom the gift procurement or promise proceeds, and also as regards him who agrees to vote for any money valuable consideration office place or employment, and the offence is declared to be a criminal offence (*b*); (2) *Treating*, which is defined as the providing by any candidate, before during or after an election, of any meat drink entertainment or provision (*c*); and (3) *Undue influence*, which the Act defines in such manner as to comprise, generally, any force, violence, or restraint, or the infliction of, or threat to inflict any injury, or the practice of any intimidation (*d*). In the case of each offence, the act must be done in order to induce some person to vote or refrain from voting, or on account of his having voted. Moreover, the Act prohibited the providing by a candidate, either for any voter or for any inhabitant of the county city or place, of any *cockade or*

that occurs of election bribery is as early as 13 Eliz., when one Thomas Longe, being a simple man and of small capacity to serve in Parliament, acknowledged that he had given the corporation by which he was returned 4*l*.; and for this offence he was removed, and the corporation was fined 20*l*.

(*a*) This Act was passed only for a limited time, but (with various amending Acts, the Corrupt Practices Prevention Act, 1863, the Parliamentary Elections Act, 1868, and the Corrupt and Illegal Practices Prevention Act, 1883), has been, so far as unrepealed, from time to time continued down to the present day: see the Expiring Laws Continuance Act, 1902.

(*b*) Corrupt Practices Prevention Act, 1854, ss. 2, 3.

(*c*) Sect. 4.

(*d*) Sect. 5; *R.* v. *Barnwell* (1857), 29 L. T. (o.s.) 107.

other mark of distinction (*e*); as also the providing of *refreshment* to any voter on the day of nomination or of polling, on account of his having polled or being about to poll (*f*). And it further enacted, that all payments made on any such account, or on account of any *chairing, bands of music, flags, or banners*, should be deemed illegal payments within the Act (*g*). With a view to the more effectual prevention of all illegal payments, the Act provided also for the annual appointment of certain officers, called *election auditors* (*h*), to whom was committed the duty of taking and publishing the accounts of all expenses incurred at elections (*i*). And no payment in respect of any election, or the expenses thereof, was to be made by, or by authority of, any candidate, except by or through the election auditor for such election (*k*); any payment that was otherwise made being declared illegal (*l*). These enactments, with the substitution of election agent for election auditors, are substantially maintained in the Corrupt and Illegal Practices Act, 1883, presently to be mentioned.

Secondly, the Representation of the People Act, 1867, declared it to be bribery, if any person should, directly or

(*e*) Sect. 7.

(*f*) Sect. 23.

(*g*) Sect. 7. So also, by the Corrupt and Illegal Practices Prevention Act, 1883, s. 7, payment of any money on account of the *conveyance of any voter to or from the poll*, whether for hiring of horses or carriages, or for railway fares, or otherwise, is made an illegal practice; and it may even amount to bribery. See as to such expenses, *Cooper* v. *Slade* (1858), 6 H. L. C. 746; *Simpson* v. *Yeend* (1869), L. R. 4 Q. B. 626. And as to employers of labour allowing their workmen and employees leave of absence to vote, without deducting from their wages for loss of time, see the Parliamentary Elections (Corrupt Practices) Act, 1885.

(*h*) 21 & 22 Vict. (1858), c. 87, ss. 2, 4.

(*i*) Corrupt Practices Prevention Act, 1854, ss. 26—28; *R.* v. *Griffiths* (1857), 7 El. & Bl. 952; *Edwards* v. *Whitehurst* (1860), 5 H. & N. 131.

(*k*) *Nurton* v. *Dickson* (1860), 5 H. & N. 637.

(*l*) Corrupt Practices Prevention Act, 1854, s. 18; and as to who is a "candidate," see the Corrupt and Illegal Practices Prevention Act, 1883, s. 63.

indirectly, corruptly pay any rate on behalf of a ratepayer, for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election; or should, directly or indirectly, pay any such rate on the voter's behalf for the purpose of inducing him to vote or refrain from voting (*m*).

Thirdly, the Corrupt and Illegal Practices Prevention Act, 1883, has adopted the definition of *bribery* contained in the Acts of 1854 and 1868, and has extended the provisions against *treating* and *undue influence* contained in the Corrupt Practices Prevention Act, 1854, to persons other than the candidate or candidates (*n*); and a *corrupt practice* is, by the Act, made to extend to and include treating and undue influence, bribery, and personation, and aiding or assisting therein, or counselling the same (*o*). Further, the Act declares the following to be *illegal practices*, namely, (1) payments or contracts to pay, for or on account of the conveyance of electors, or to any elector on account of the use of any premises for the exhibition of bills, notices, and the like, or on account of any use, in excess of the permitted use, of committee-rooms (*p*); (2) payments made or expenses incurred in excess of the maximum election expenses and of the payments specified in the first schedule to the Act (*q*); (3) subornation of voters; (4) false statements as to withdrawal of any candidate or candidates (*r*); any corrupt withdrawal of candidates (*s*); (5) payments for ribbons, cockades, and the like (*t*); (6) paid employment of agents, other than the election agent and sub-agent and polling agent or agents mentioned in the first schedule to the Act (*u*); (7) printing and publishing bills and the like,

(*m*) Representation of the People Act, 1867, s. 49.
(*n*) Corrupt and Illegal Practices Act, 1883, ss. 1, 2.
(*o*) Sect. 3.
(*p*) Sect. 7; and see ss. 13, 14.
(*q*) Sect. 8.
(*r*) Sect. 9; and see s. 15.
(*s*) Sect. 15.
(*t*) Sect. 16.
(*u*) Sect. 17.

without the name and address of the printer and publisher (*x*); (8) using as committee-room any premises whereon intoxicating liquors or refreshments are ordinarily sold or provided, or any elementary school premises (*y*). Lastly, under the Corrupt and Illegal Practices Prevention Act, 1895, any false statements of fact, in relation to the personal character or conduct of either candidate, are to be deemed "illegal practices."

The following punishments for offences thereunder are also prescribed by the Corrupt and Illegal Practices Act, 1883, that is to say :—

First, for *corrupt* practices. If the candidate is personally guilty, the election is avoided, and he is rendered ineligible for ever for that constituency (*z*); but if the candidate was only guilty through his agents, his ineligibility is limited to seven years (*a*). Further, the candidate or any other person so offending (except by personation) is liable to imprisonment not exceeding one year, with or without hard labour, or to a fine not exceeding 200*l.*; and any person guilty of personation, is liable to imprisonment with hard labour not exceeding two years. After conviction, he cannot for seven years vote at any election whatever, parliamentary or municipal; or hold any office, public or judicial, or be elected or continue a member of parliament (*b*).

Secondly, in case of *illegal* practices, any person convicted thereof is liable to a fine not exceeding 100*l.*, and for five years cannot vote at any election, parliamentary or municipal, within the county or borough in which the offence was committed (*c*); and if the election commissioners, after hearing an election petition, report the prevalence of illegal practices, the candidate, if he is reported to have known thereof or assented thereto, loses

(*x*) Sect. 18.
(*y*) Sect. 20.
(*z*) Corrupt and Illegal Practices Act, 1883, s. 4.
(*a*) Sect. 5.
(*b*) Sect. 6.
(*c*) Sect. 10.

his election, and becomes ineligible for that constituency for seven years, or (if he was only guilty through his agents) during the then parliament (*d*).

The election being closed, the sheriff or other returning officer returns the writ, with the names of the persons elected by the majority (*e*), to the clerk of the crown in chancery, to whom also the poll books are delivered, for their future safe custody (*f*). If the returning officer wilfully delays, neglects, or refuses, duly to return any person who ought to be returned, he is liable to an action at the suit of the party aggrieved. But no such action is to be commenced, save within one year after the commission of the injury, or within six months after the conclusion of the trial relating to the election (*g*); and the members returned by the returning officer are the sitting members until the return shall be declared false and illegal. And here we may observe, that the Reform Act of 1832 provided, that a returning officer, or any other person wilfully contravening its provisions, should be liable to be sued by the party aggrieved thereby, in which action the jury might find a verdict for such sum as they should think just, to the extent of 500*l.* (*h*).

The form and manner of proceeding to impugn the return of a member, are regulated by the Parliamentary Elections Act, 1868 (*i*), with the amending Act of

(*d*) Sect. 11. The Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (extending the Corrupt Practices (Municipal Elections) Act, 1872), contains very similar provisions regarding "corrupt practices" and "illegal practices" at *municipal* elections.

(*e*) See 23 Hen. 6 (1445), c. 14.

(*f*) Parliamentary Voters Registration Act, 1843, s. 93.

(*g*) Parliamentary Elections Act, 1868, s. 48.

(*h*) Representation of the People Act, 1832, s. 76. By the Parliamentary Voters Registration Act, 1843, s. 97, a similar action, with damages to the extent of 100*l.*, was given for the wilful breach of the provisions of that Act. (See *Pryce* v. *Belcher* (1846), 3 C. B. 58; (1847) 4 C. B. 866; Ballot Act, 1872, s. 11.)

(*i*) *Peake* v. *Norwood* (1869), L. R. 4 C. P. 235: *Waygood* v. *James*, *ib.*, 361; *Stevens* v. *Tillett* (1870), L. R. 6 C. P. 147.

1879 (*k*), and by the Corrupt and Illegal Practices Prevention Act, 1883, and are in substance as follows. Any person who voted, or had a right to vote, at the election, or who claims to have had a right to be returned or to have been elected, or alleges himself to have been a candidate thereat, may (within the period of twenty-one days after the return, or, in case of an alleged corrupt practice, within twenty-eight days, or, in case of an illegal practice, within fourteen days, after the date of such alleged practice) subscribe a petition, complaining of an undue return or election (*l*); which petition shall thereupon be served by the petitioner on the respondent, that is to say, on the candidate or candidates who have been returned (*m*). The petitioner must give security, to the amount of one thousand pounds, for the payment of all costs charges and expenses (*n*). The trial is conducted before two judges of the High Court, sitting *de die in diem*, in open court, and without a jury, and with witnesses examined on oath, and, as a general rule, in the borough or county the election whereat has been impugned (*o*); and the director of public prosecutions (who is now the Solicitor to the Treasury) must, by himself or by his deputy, attend the trial (*p*). At the conclusion of the trial, the judges determine whether the member whose return or election is complained of, or any or what other person, was duly returned or elected, or whether the

(*k*) 42 & 43 Vict. c. 75.

(*l*) Parliamentary Elections Act, 1868, s. 6; and Corrupt and Illegal Practices Act, 1883, s. 40.

(*m*) Parliamentary Elections Act, 1868, s. 8.

(*n*) Parliamentary Elections Act, 1868, s. 6 (5); *Hill* v. *Peel* (1870), L. R. 5 C. P. 172; *Hughes* v. *Meyrick*, *ib.* 407. As to costs, see Corrupt and Illegal Practices Act, 1883, s. 44.

(*o*) Parliamentary Elections Act, 1868, s. 11; Parliamentary Elections and Corrupt Practices Act, 1879; and the Corrupt and Illegal Practices Act, 1883, s. 42. The judges are directed, on or before the third day of Michaelmas term, in every year, to select, by a majority of votes, certain of their number to be placed on a rota for the trial of election petitions during the ensuing year.

(*p*) Corrupt and Illegal Practices Act, 1883, s. 43; Prosecution of Offences Act, 1884, s. 2.

election was void; and they certify the same in writing to the speaker. The determination of the judges is final to all intents and purposes; and on receiving the judges' certificate, the house itself gives directions as to confirming or altering the return, or issuing a writ for a new election, as circumstances may require (*q*). But if it appears to the judges trying an election petition that any questions of law, as to the admissibility of evidence or otherwise, require further consideration by the court in banc, it is lawful for them to postpone the grant of their certificate until the court has determined such questions (*r*). Also, where any charge is made, in the petition, of any corrupt or illegal practice, the judges are required to certify as to the same, or to make any special report such as the occasion may require (*s*); in the latter case, the house of commons may make such order in respect of any such special report as they shall think proper (*t*). And, on a report by the judges that any corrupt or illegal practice has been committed, either by a candidate personally, or through an agent with his knowledge and consent, or by any other person, the guilty party is subject to such incapacities penalties and disqualifications as have been already mentioned (*u*). And where it is represented to his Majesty, by a joint address of both houses of parliament, that there is reason to believe, or that an election court has reported to the speaker, that corrupt or illegal practices have extensively prevailed in any county, borough,

(*q*) Parliamentary Elections Act, 1868, s. 13.

(*r*) *Ibid.*, s. 12.

(*s*) *Ibid.* s. 11 (14). With regard to the *witnesses* at the trial of the petition, it may be noticed that under this Act they are entitled not only to their reasonable expenses, but also to an *indemnity* (s. 34). And see Corrupt and Illegal Practices Prevention Act, 1883, s. 59.

(*t*) Parliamentary Elections Act, 1868, s. 14.

(*u*) *Vide supra*, p. 411. By 34 & 35 Vict. (1871), c. 77, several persons having been reported to the House as having been guilty of bribery at an election for a certain borough, such persons were by name severally prohibited from voting *at any time* at any parliamentary election for such borough.

or other place sending a member or members to parliament, his Majesty may appoint commissioners to make inquiry into these alleged practices ; and it has been the practice of the legislature, where the report of such commissioners has been unfavourable, to deprive such place, either permanently or for a time, of its right to send members to parliament (*x*).

It may be noticed, as a matter of considerable historical interest, that between 1604 and 1868 disputed election returns were decided in the house of commons itself, either before a committee of the whole house, or before a select committee (*y*). The course adopted by the Act of 1868 was in effect a return to a practice originally adopted in 1410 (*z*).

When a member is once duly elected, and has been duly sworn, or has duly affirmed (*a*), he is compellable to discharge the duties of the public trust thus conferred upon him, and is bound to be present at every call of the house, unless he can show a sufficient excuse for his non-attendance ; but as there has been no call of the house since 1836, it may be considered that this method of enforcing attendance is now obsolete. Apparently, however, non-attendance may be treated as a contempt and punished accordingly (*b*). Nor is a member entitled by law to resign his seat ; but it has long been usual for the Crown to bestow on any member wishing to vacate his seat the stewardship of the Chiltern Hundreds, or of one of the

(*x*) This course has been taken with regard to several boroughs. As to the practice pursued at such inquiries, see *Fitzgerald's Case* (1869), L. R. 5 Q. B. 1 ; *ib.* 5 Exch. 21 ; and as to certificates of indemnity given to witnesses by such commissioners, see the Corrupt and Illegal Practices Prevention Act, 1883, s. 59 ; *R.* v. *Hulme* (1870), L. R. 5 Q. B. 377 ; *R.* v. *Price* (1871), L. R. 6 Q. B. 411 ; and as to the expenses of such inquiries, see Corrupt Practices Commission Expenses Act, 1869, continued by successive Expiring Laws Continuance Acts.

(*y*) Grenville's Act, 1770 ; 4 & 5 Vict. (1841), c 8 (Sir R. Peel's Act) ; 11 & 12 Vict. (1848), c. 98.

(*z*) 11 Hen. 4, c. 1 (3). See further, Anson, *Law and Custom*, vol. i. p. 163.

(*a*) *Vide sup.* p. 371.

(*b*) Hansard, clvi pp. 1931, 2213.

royal manors of East Hendred, Northstead, or Hempholme, the appointment to which offices, though merely nominal, is, through the operation of the Succession to the Crown Act (1707), sufficient for that purpose.

This practice is believed to have begun not earlier than about the year 1740, and as regards the Chiltern Hundreds not till 1751. It has been suggested (*c*) that it would be difficult, from the form of appointment to the Chiltern Hundreds, to show that it *is* an office (*d*); but the form of appointment to the Manor of Northstead clearly alludes to the stewardship as an office (*e*).

This summary of the law of parliamentary elections concludes our inquiries into the laws and customs more peculiarly relating to the house of commons.

VI. [We proceed now to consider the method of making laws; and this is much the same in both houses. But first it must be premised, that, for dispatch of business, each house of parliament has its *speaker*. The speaker of the house of lords—whose office it is to preside there, and to manage the formalities of business—is, by prescription, the lord chancellor, or keeper of the great seal, or any other appointed by royal commission; and he need not necessarily be a peer. If none be so appointed, the house of lords may, it is said, elect. The speaker of the house of commons is one of its members chosen by the house (*f*); but he must be approved by the Crown (*g*). And herein the

(*c*) 2 Hatsell, 41.

(*d*) See May, *Law of Parl.* (10th ed.), p. 606. An *Irish* member accepts, in order to effect the same object, the nominal office of "Escheator of Munster."

(*e*) Anson, *Law and Custom*, vol. i. p. 92.

(*f*) Com. Dig. *Parl.* E. 5. As to his salary, &c., see 30 Geo. 3, c. 10 (1790); the House of Commons (Speaker) Act, 1832; the House of Commons (Officers) Act, 1834. As to the *deputy* speaker, see Deputy Speaker Act, 1855.

(*g*) Sir Edward Coke, upon being elected speaker in 1592, in his address to the throne, declared, "this is only as yet a nomination, "and no election, until your "majesty giveth allowance and "approbation." (2 Hats. 164.) But the House of Commons at present, says Mr. Christian (1 Bl. Com. p. 181), would scarce admit their speaker to hold such language.

[usage of the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house (*h*) ; but the speaker of the house of lords, if a lord of parliament, may do so. In each house, the act of the majority binds the minority ; and this majority is declared by votes, openly and publicly given, not privately or by ballot, which latter method may be serviceable to prevent intrigues and unconstitutional combinations, but cannot be practised, at least in the house of commons, where every member's conduct is subject to the future censure of his constituents.] In the house of commons, the speaker never votes, except when the votes of the house are otherwise equal, in which latter case, he has a casting vote (*i*) ; but the speaker of the house of lords has his vote counted with the rest of the house, and in the case of an equality of votes there, the negative opinion prevails (*j*).

[To introduce a bill in either house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition, which petition must be presented by a member, and usually sets forth the grievance desired to be remedied. The petition, when founded on facts that may be in their nature disputed, is referred to a committee of members, who examine the matter alleged, and report it to the house ; and then, or otherwise, upon the mere petition, leave is given to bring in the bill (*k*). In the House of Lords, if the bill begin there, and it is of a private nature, it used to be referred to two of the judges, to examine and report the state of facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety ;] but this duty is now discharged by means of certain officers called examiners, appointed by

(*h*) But when the house resolves itself into a committee, the case is otherwise. *Vide post*, p. 420.

(*i*) May, *Law of Parl.* 10th ed. p. 344.

(*j*) 33 Lords' J. 519 ; 14 Lords' J. 167, 168.

(*k*) Com. Dig. *Parl.* G. 11 ; Witnesses on Petitions Act, 1801.

the house itself (*l*). In public matters, a bill originating in the commons is brought in upon motion made to the house to obtain leave for that purpose; and then no petition is required. But there are many "standing orders" relative to the introduction of bills, and more especially of private bills, which are of too minute a nature to be detailed in this place (*m*).

[Formerly all bills were drawn in the form of petitions to the Crown (*n*), which were entered upon the *parliament rolls*, with the king's answer thereunto subjoined, not in any settled form of words, but as the circumstances of the case required (*o*). Then, at the end of each parliament,

(*l*) In the House of Commons, the examiners of private bills are appointed by the speaker.

(*m*) See Parliamentary Documents Deposit Act, 1837, as to the deposit of *plans and documents* in the case of private bills; Preliminary Inquiries Act, 1851, as to the *preliminary inquiries* to be made on all applications for local Acts affecting navigation; House of Commons Costs Taxation Acts, 1847 and 1879, House of Lords Cost Taxation Act, 1849, Parliamentary Costs Act, 1865, and Parliamentary Costs Act, 1871, as to *costs* on private bills; and Parliamentary Witnesses Oaths Act, 1871, as to the power of committees of the house to administer oaths to witnesses.

(*n*) The commons, for nearly two centuries, continued the style of very humble petitioners. Their petitions frequently began with "Your poor commons beg and pray," and concluded with "for God's sake, and as an act of charity";—"*Vos poveres communes prient et supplient, pur Dieu et en œuvre de charité.*" (Rot. Parl. *passim.*) And it appears that, prior to the reign of Henry the Fifth, it had been the practice of the kings to add and enact more than the commons petitioned for; in consequence of which there was a very memorable petition from the commons in 2 Hen. 5 (1414), which stated that it was the liberty and freedom of the commons that there should be no statute without their assent, considering that they had ever been as well assenters as petitioners. And therefore they prayed that, for the future, there might be no additions or diminutions to their petitions; and in answer, the king granted that from henceforth they should be bound in no instance without their assent, save his royal prerogative to grant and deny what he pleased of their petitions (Ruff. Bref. xv.; Rot. Parl. 2 Hen. 5 (1414), No. 22).

(*o*) See, among numberless other instances, the *Articuli Cleri*, 9 Edw. 2. As to the antient form

[the judges drew them up in the form of a statute, which was entered on the *statute roll;* and in the reign of Henry the Fifth, to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament. Under Henry the Sixth, however, bills in the form of Acts, according to the modern custom, began to be introduced.] The style now used in an Act of Parliament, is as follows :—"Be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same."

Supposing the bill to commence in the house of commons and to be of a public nature, the persons directed to bring in the bill present it to the house drawn out in a proper form (*p*). The bill is then read a first time and ordered to be printed; after a convenient interval it is read a second time; and after each reading, the speaker opens to the house the substance of the bill, and puts the question whether it shall proceed any further (*q*). [The introduction of the bill may be originally opposed, as the bill itself may be at any of its readings; and if the opposition to its introduction succeeds, the bill must be

of our statutes, much information will be found in Reeves *Hist. Eng. Law* (ed. Finlason), vol. i. p. 250; vol. ii. pp. 514, 656.

(*p*) See Interpretation Act, 1889, repealing but re-enacting the provisions of 13 & 14 Vict. (1850), c. 21 (often called Lord Brougham's Act) as to shortening the language used in Acts of Parliament. We may also notice here, that, in order to avoid the necessity of repeating in many different Acts the various provisions usually introduced into such as authorize the execution of undertakings of a public nature by companies and others, and also in order to secure uniformity, those provisions are now consolidated in divers general Acts; and into any subsequent statute passed with reference to such undertakings, one or more of such "Consolidation Acts," or certain of their clauses (as the case may require), are incorporated by reference. See Ilbert, *Legislative Methods and Forms*, ch. xi.

(*q*) Com. Dig. *Parl.* G. 12, 13, 14.

[dropped for that session, as it must also be, if opposed with success in any of its subsequent stages. Then after the second reading, it is *committed*, that is, referred to a committee; which is either selected by the house, or consists of the whole house. In order to form a committee of the whole house, the speaker quits the chair, another member being appointed chairman; and the speaker is then free to sit and debate as a private member. In these committees, the bill is debated clause by clause, amendments are made, and blanks are filled in; and sometimes the bill is entirely new-modelled. After it has gone through committee, the chairman reports it to the house, with such amendments as the committee may have made; the house then reconsiders the whole bill once more, and the question is repeatedly put upon every clause and amendment. When the house has agreed or disagreed with the amendments of the committee, and sometimes added new amendments of its own, the bill is ordered to be reprinted (*r*); it is then read a third time, at which stage amendments are also sometimes made to it, and new clauses added. The speaker then again opens the contents, and, holding it up in his hands, puts the question, whether the bill shall pass. If this is agreed to, the title of the Act is next settled; and the title used to be a general one for all the Acts passed in the session, till, in the time of Henry the Eighth, distinct titles were introduced for each chapter (*s*). After this, the bill is printed fair by the King's printer, and one of the members is directed to carry it to the

(*r*) 90 Com. Journ. 337; 105 *ibid.* 372. At this stage of the proceedings, the former practice was to *engross* the bill on one or more pieces of parchment; but this engrossing was discontinued in 1849. See May's *Law of Parl.* (10th ed.) p. 471. And see *per* Willes, J., *Claydon* v. *Green* (1868), L. R. 3 C. P. 511.

(*s*) It is said that this custom first began in the fifth year of Henry the Eighth. (Reeves, *Hist. Eng. Law*, vol. iv. p. 412.) As to the relation of the title to the Act, *vide sup.* vol. i. p. 40.

[lords, and to desire their concurrence ; and the member thus deputed, attended by several more, carries it to the bar of the house of lords, and their delivers it to their speaker, who comes down from the woolsack to receive it (*t*).

In the house of lords, the bill then passes through the same forms as in the house of commons, and, if rejected, no more notice is taken ; but the matter passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message, (which upon matters of high dignity or importance used to be conveyed by two of the judges,) that they have agreed to the same ; and the bill remains with the lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill, to receive the concurrence of the commons ; and if the commons disagree with the amendments, a conference sometimes follows between members deputed from each house, or else the commons may appoint a committee to draw up the reasons for disagreeing with the lords' amendments. The houses, for the most part, settle and adjust the differences ; but if both remain inflexible, the bill is dropped (*u*). If, however, the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords (*x*). When both houses have done with any bill, it is deposited in the house of peers, to wait the royal assent, except in the case of the Appropriation Bill (which includes all the items of *supply*), for this, after

(*t*) *Cf.* Anson, *Law and Custom*, vol. i. p. 256.

(*u*) Com. Dig. *Parliament*, G. 24. See as to the real pre-eminence of the Commons in legislation, Anson, *ubi supra*, pp. 263, 264.

(*x*) No motion or permission to present the bill, however, is here necessary, every peer being at liberty to present a bill and lay it on the table of the house. See May, *Law of Parl.* (10th ed.) p. 436.

[receiving the concurrence of the lords, is sent back to the house of commons (*a*), and eventually taken by the speaker to the lords to receive the assent of the Crown, when the commons attend in the lords to hear the prorogation (*b*).

The royal assent may be given either in person or by commission. First, where it is given in person, the king comes to the house of peers, and, sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman-French (*c*). If the king consents to a public bill, the clerk usually declares "*le roy* (or *la reine*) *le veult*;" if to a private bill, "*soit fait comme il est desiré.*" If the king refuses his assent, it is in the gentle language of "*le roy* (or *la reine*) *s'avisera*" (*d*); but when a money bill is passed, the royal assent is thus expressed, "*le roy* (or *la reine*) *remercie* "*ses bons subjects, accepte lour benevolence et aussi le veult.*" In case of an Act of grace, which originally proceeds from the Crown, and has the royal assent in its first stage, the clerk of the parliament thus pronounces the gratitude of the subject: "*les prelats, seigneurs, et commons, en ce* "*present parliament assemblés, au nom de touts vous autres* "*subjects, remercient très humblement votre Majesté, et* "*prient à Dieu vous donner en santé bone vie et longue*" (*e*).

(*a*) Com. Journ. 24th July, 1660. When an Act of grace or pardon is passed, it is first signed by the king, and then read once only in each of the houses, without any amendment. (D'Ewes' Journ. 20, 73; Com. Journ. 17th June, 1747.)

(*b*) Rot. Parl. 6 Hen. 4, in Pryn.; 4 Inst. 22, 28.

(*c*) The language of the statutes prior to the reign of Richard the Third, is generally Latin or French. But all Richard the Third's statutes are in English, and so they have continued to be drawn in all subsequent periods.

(*d*) The words *le roi s'avisera* correspond to the phrase formerly used by courts of justice, when they required time to consider of their judgment, viz., *curia advisari vult*. And there can be little doubt but originally the phrase implied a serious intent on the part of the monarch, to take the subject into consideration.

(*e*) D'Ewes' Journ. 35. But see May, *Law of Parl.* (10th ed.) p. 484.

[Secondly, the royal assent may be given by commission: this is by virtue of the statute 33 Hen. VIII. (1542), c. 21, which enabled the king to give his assent by letters-patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the higher house. When the bill has received the royal assent in either of these ways, it is then, and not before, a statute or Act of Parliament (*f*);] and by the Acts of Parliament (Commencement) Act, 1793, the clerk of parliament is directed to indorse on every Act, immediately after the title thereof, the day, month, and year when the same passed, and received the royal assent. Such indorsement is part of the Act, and is the date of the commencement of the Act, where no other time for its commencement is prescribed (*g*).

[The statute or Act is placed among the records of the kingdom, there needing no formal promulgation of it to give it the force of a law, (as was necessary by the civil law with regard to the emperor's edicts,) because every man in England is, in judgment of law, party to the making of an Act of Parliament, being present thereat by his representatives. However, the King's printer is bound, by virtue of his office, to print each Act for the information of the whole land (*h*). And, formerly, before the invention of printing, all Acts used to be published by the

(*f*) *R.* v. *Justices of Middlesex* (1831), 2 B. & Ad. 818.

(*g*) As to the law with respect to the time when a statute begins to operate, see also *sup.* vol. i. p. 37.

(*h*) 104 Com. Journ. 51. *Public* statutes (as to which *vide sup.* vol. i. p. 36) need no proof in courts of justice, being judicially noticed, and by the Crown Debts Act, 1801, s. 9, copies of Acts of Great Britain and Ireland, printed by the king's printer prior to the Union, are made conclusive evidence of the Acts, as between the two countries. By the Evidence Act, 1845, ss. 3, 4, all copies of private Acts, and of the journals of either house, if purporting to be printed by the printers to the Crown, or to either house of parliament, are admitted as evidence thereof; and by the Documentary Evidence Act, 1882, s. 2, if purporting to be printed under the superintendence or authority of her Majesty's stationery office.

[sheriff of every county, the King's writ being sent to him at the end of every session, together with a transcript of all the Acts made at that session, commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in* "*singulis locis ubi expedire viderit, publicè proclamari, et* "*firmiter teneri et observari faciat.*" And the usage was to proclaim them at the county court of the sheriff, and there to keep them, that whoever would might read or take copies thereof. This custom continued till the reign of Henry the Seventh (*i*).

An Act of Parliament thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth; it binds every subject in the land, and the dominions thereunto belonging — nay, even the king himself, if particularly named therein. It cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament; it being a maxim of the law, that it requires the same strength to dissolve as to create an obligation. It was indeed formerly held, that the king might in some cases dispense with penal statutes (*k*); but by the Bill of Rights of 1689, it was declared that the power of suspending or dispensing with laws, by regal authority without consent of parliament, "*as it hath been assumed and exercised of late*," was altogether illegal. Such suspension or dispensation on the part of the Crown therefore now requires an Act of Parliament enabling the Crown in that behalf (*l*).

VII. There remains only, in the seventh and last place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued or dissolved.

An *adjournment* is no more than a continuance of the

(*i*) 3 Inst. 41; 4 Inst. 26.

(*k*) Finch, L. 82, 234; Bacon, *Elem.* ch. 19.

(*l*) The Remission of Penalties Act, 1875. *e.g.*, enables the Crown to dispense with the penalties under the Sunday Observance Act, 1780.

[session from one day to another, as the word itself signifies. This is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other (*m*). It hath also been usual, when his Majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the royal pleasure so signified, and to adjourn accordingly (*n*). Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow: which would often be very inconvenient both to public and private business. For a prorogation puts an end to the session, and then such bills as are only begun and not perfected, must be resumed *de novo* (if at all) in a subsequent session; whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A *prorogation* is the continuance of the parliament from one session to another, as an adjournment is a continuation of the session from day to day; and a prorogation is by the royal authority alone, usually expressed by the lord chancellor, in the presence of, or by commission from, the Crown, or else by proclamation.] By the Prorogation Act, 1867, such last mode of announcing the royal intention is expressly made sufficient notice thereof, provided the day of prorogation be to some day not less than fourteen days from the day for which parliament then stood summoned or prorogued; and provided also that the prorogation be not at the close of a session, to which case the Act is not to apply. [Both houses are necessarily prorogued at the same time, the prorogation not being of the house of lords, or commons, but of the parliament. The session is never understood to be at an end until a prorogation; though,

(*m*) 4 Inst. 28.

(*n*) Com. Journ. *passim*; *e.g.*, 11th June, 1572; 21st May, 1768.

[unless some Act were passed or some judgment given in parliament, it would in truth be no session at all (*o*). And formerly the usage was, for the king from time to time to give the royal assent to all such bills as he approved, and then to prorogue the parliament, though sometimes only for a day or two, and thus end the session (*p*); which custom obtained so strongly, that it was at one time made a question whether giving the royal assent to a single bill did not, as of course, put an end to the session (*q*). And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. I. (1625), c. 7, was passed to declare, that the king's assent to that and some other Acts should not put an end to the session. And even afterwards, in the reign of Charles the Second, we find a proviso tacked to the first bill then enacted, that his majesty's assent thereto should not determine the session of parliament (*r*). But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session.] The prorogation is to a day fixed; but by the joint effect of the Meeting of Parliament Acts, 1797, 1799, and 1870, the Crown may now by proclamation at any time, without regard to the period to which parliament may stand prorogued or adjourned, appoint it to reassemble for dispatch of business at the expiration of six days from the date of the proclamation.

[A *dissolution* is the civil death of the parliament; and this may be effected in three ways (*s*), that is to say:—

1. A parliament may be dissolved by the king's will, expressed either in person or by representation. For, as he has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may, whenever he pleases, either prorogue the parliament for a time, or put a final period to its existence. If none but

(*o*) 4 Inst. 28; Hale, *Parl.* 38.
(*p*) Com. Journ. 21st Oct. 1553.
(*q*) *Ibid.* 21st Nov. 1554.
(*r*) See, for example, 22 & 23 Car. 2 (1670), c. 1.
(*s*) Com. Dig. *Parl.* P. 1, 2.

[itself had a right to prorogue or dissolve a parliament, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power; as was fatally experienced by the unfortunate King Charles the First, who, having unadvisedly passed an Act to continue the parliament then in being to such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power which he himself had consented to give it.

2. Until recently it was the rule, that any parliament in being was dissolved by the demise of the Crown. And, by the common law, this dissolution happened immediately upon the death of the reigning monarch; for he being considered in law as the head of the parliament (*caput, principium, et finis*), that failing, the whole body was held to be extinct (*t*). But the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being, in case of a disputed succession, it was provided by an Act of 1696 (*u*), that the parliament in being should continue for *six months*, but no longer, after the demise of the Crown, unless sooner prorogued or dissolved by the successor; and that, if it were at the time of such demise separated by adjournment or prorogation, it should re-assemble immediately. It was also enacted by the Meeting of Parliament Act, 1797 (*x*),

(*t*) Accordingly, offices held under the Crown, were formerly, in general, vacated by the demise of the Crown (Bac. Ab. *Courts* (C.)); but by the Succession to the Crown Act, 1707, and the Demise of the Crown Act, 1727, commissions and offices under the Crown (whether civil or military) were continued for six months after the demise, and by the Demise of the Crown Act, 1830, no fees or stamp duties were to be charged on the renewal of them. But now, under the Demise of the Crown Act, 1901, the holding of any office under the Crown is not to be affected by the demise of the Crown. As to the commissions of the *judges*, *vide post*, Chap. x., on Magistrates.

(*u*) 7 & 8 Will. 3, c. 15, repealed by Statute Law Revision Act, 1867.

(*x*) Sections 3, 4, and 5.

that, in case of such demise between a dissolution and the day appointed by the writs of summons for the meeting of a new parliament, the last preceding parliament should immediately convene for six months, unless sooner prorogued or dissolved by the succeeding monarch; and that in the event of such demise on or after the day appointed for assembling the new parliament, but before it had in fact assembled, then the new parliament should in like manner convene for six months, unless sooner prorogued or dissolved. The law on this subject, however, is now regulated by the Representation of the People Act, 1867, s. 51, which enacts, that "the parliament in being at any future demise of the Crown shall not be determined or dissolved by such demise, but shall continue so long as it would have continued but for such demise, unless it shall be sooner prorogued or dissolved by the Crown."

3. [Originally the duration of Parliament was limited only by the pleasure or death of the king; but more than two centuries ago legislation interfered, and now a parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual, or might last for the life of the prince who convened it, as formerly, then if it were once corrupted, the evil would be past all remedy; but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly, also, which is sure to be separated again, whereby its members will themselves become private men, and subject to the laws which they have themselves enacted, will think itself bound, in interest as well as in duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit was, by the Triennial Act, 1694, *three* years; after the expiration of which, reckoning from the day of meeting appointed by the writ of summons, the parliament was to have no longer continuance. But the Septennial Act, 1715, in order, professedly, to prevent the great and continued expenses

[of frequent elections, and the violent heats and animosities consequent thereupon, in reality for the security of the government, then just recovering from the late rebellion, prolonged this term to *seven* years; and, what alone is an instance of the vast authority of parliament, the very same house that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year, if not sooner dissolved by the Crown] (*y*).

(*y*) It may be stated that in its judicial capacity as a Court of Appeal, the House of Lords sits notwithstanding any prorogation (Appellate Jurisdiction Act, 1876, s. 8); and may (by authority of the Crown under the sign-manual) sit even during a dissolution (*Ibid.* s. 9). And see the Appellate Jurisdiction Act, 1887, s. 1.

CHAPTER II.

OF THE MONARCH, IN HIS GENERAL RELATION TO THE PEOPLE; AND HEREIN, OF THE LAW OF SUBJECT AND ALIEN.

THE supreme executive power of the United Kingdom of Great Britain and Ireland and its dependencies is vested by our laws in a single person, the king or queen, under such style and title as are appointed by royal proclamation under the great seal of the United Kingdom (*a*); and it matters not to which sex the crown descends, the person entitled thereto, whether male or female, being immediately invested with all the ensigns, rights, and prerogatives of royal power, as was declared by the 1 Mar. sess. 3 (1554), c. 1. For the better understanding of the law and laws relating to this supreme executive power, we shall consider the monarch,

First, with regard to his people in general;
Secondly, with regard to his title;
Thirdly, with regard to his family;
Fourthly, with regard to his councils;
Fifthly, with regard to his prerogative;
Sixthly, with regard to his revenue; and
Seventhly, with regard to his forces.

First, with regard to the relation which subsists between the monarch and his people.—[The principal duty of the

(*a*) See the Union with Ireland Act, 1800; the Royal Titles Acts, 1876 and 1901. The present style and title adopted by our king is "Edward VII. by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India."

[king is to govern his people *according to law*. "The king," saith Bracton, "ought not to be subject to man, but to God, "and to the law; for the law maketh the king. And he is "not truly king where will and pleasure rule, and not the "law" (*b*). Fortescue also lays it down as a principle, that "the king of England must rule his people according "to the laws thereof, being bound, by an oath at his "coronation, to the observance and keeping of such "laws" (*c*). And these provisions of the common law have been embodied and declared by the Act of Settlement, 1700, in the words following, namely:—"that the "laws of England are the birthright of the people thereof; "and all the kings and queens who shall ascend the throne "of this realm ought to administer the government of the "same according to the said laws: and all their officers "and ministers ought to serve them respectively according "to the same: and therefore all the laws and statutes of "this realm, for securing the established religion, and the "rights and liberties of the people thereof, and all other "laws and statutes of the same now in force, are ratified "and confirmed accordingly." And to the like effect is the oath, which, by the Act for Establishing the Coronation Oath, 1688, is administered at the coronation to every king and queen succeeding to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of the people in the following manner:—"*The arch-*"*bishop or bishop shall say*,—Will you solemnly promise "and swear to govern the people of this kingdom of "England, and the dominions thereto belonging, according "to the statutes in parliament agreed on, and the laws and "customs of the same? *The king and queen shall say*,— "I solemnly promise so to do. *Archbishop or bishop*,— "Will you to your power cause law and justice in mercy

(*b*) L. 1, ch. 8; L. 2, ch. 16, s. 3.

(*c*) C. 9, and c. 34. And compare Justinian's Institutes, ii. 17, 8, recording the opinion of the Emperors Severus and Antoninus, —"*Licet enim legibus soluti sumus, attamen legibus vivimus.*"

[" to be executed in all your judgments? *King and* " *queen*, — I will. *Archbishop or bishop*, — Will you " to the utmost of your power maintain the laws of God, " the true profession of the Gospel, and the Protestant " reformed religion established by the law? And will " you preserve unto the bishops and clergy of this realm, " and to the churches committed to their charge, all such " rights and privileges as by law do or shall appertain " unto them, or any of them? *King and queen*, — All " this I promise to do. *After this the king and queen*, " *laying his and her hand upon the Holy Gospels, shall say*, " —The things which I have here before promised I will " perform and keep; so help me God. *Then the king* " *and queen shall kiss the book*."

The coronation oath expresses, it is to be observed, all the duties that a monarch can owe to his people: viz. to govern according to law: to execute judgment in mercy; and to maintain the established religion. With regard to the first of these, enough has been said; with regard to the second, which involves both the humanity of our laws and the exercise of the prerogative of mercy, more will be said hereafter in the course of these Commentaries; but with regard to the third, namely, the maintenance of the established religion, it is convenient here to remark that the maintenance of the established religion is also provided for by statute as follows:— (1) By the Bill of Rights (1689), and the Act of Settlement (1700), every king and queen regnant of the age of twelve years, either at their coronation, or on the first day of the first parliament, (whichever event shall first happen,) upon the throne in the house of peers, is required to repeat and subscribe the declaration against Popery, according to the 30 Car. II. (1679), st. 2; and (2) by the Act of Union with Scotland (1706), two preceding statutes are recited and confirmed, one of Scotland, and the other of England, the former requiring that every king, at his accession, shall take and subscribe an oath to

[preserve the protestant religion and presbyterian church government in Scotland, and the latter requiring that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the church of England as by law established (*d*).

Protection and subjection being in their very nature reciprocal (*e*), we may now pass from the duties of the monarch to the duties of the people, in other words, to the subject of *allegiance*. Now allegiance is the tie, or *ligamen*, which binds the subject to the ruler, in return for the protection which the ruler affords to the subject. Under the feudal system, there was a mutual trust or confidence subsisting between the lord and his vassal; the vassal was bound to be faithful to his lord, and defend him against all his enemies, which obligation on the part of the vassal was called his *fealty*, and the oath of fealty was required to be taken by all tenants to their lord. This oath of fealty usually contained, however, a saving or exception of the faith due to some superior lord by name; as where the lord, being but a *mesne* lord, was himself also a tenant or vassal. But where the lord was the absolute superior himself, and was vassal to no man,—which is the position of the monarch,—it was no longer called the oath of fealty, but the oath of allegiance; the subject, whether landholder or not, swearing to bear faith to his sovereign lord in opposition to all men, *simpliciter* and without any saving or exception—"*contra omnes homines fidelitatem fecit*" (*f*). Accordingly, the oath of allegiance, as administered in this country for upwards of six hundred years, contained a promise "to be true "and faithful to the king and his heirs, and truth and "faith to bear of life and limb and terrene honour; and "not to know or hear of any ill or damage intended him,

(*d*) The Union with Scotland Act, 1706, art. xxv. ss. 2, 3, 5.

(*e*) *Calvin's Case* (1608), 7 Rep. 5 a.

(*f*) 2 Feud. 99.

[" without defending him therefrom " (*g*). But, at the Revolution, another form was introduced by the convention parliament (*h*), the subject only promising " that he will be faithful and bear *true* allegiance " to the sovereign, without mentioning " his heirs," or specifying in the least wherein that allegiance consists.] And in the oath of allegiance as administered up to the 23rd July, 1858, the style so introduced was still retained. But from the 23rd July, 1858, a single oath was substituted, by the 21 & 22 Vict. (1858), c. 48, to be taken in the same cases as the several oaths of allegiance, supremacy, and abjuration previously in force; and by the Office and Oath Act, 1867, such substituted oath was re-framed, so as to adapt it to the use not only of Protestants, but also of Roman Catholics and Jews. The form of oath was once more altered, however, by the Promissory Oaths Act, 1868; and, as so settled (*i*), is now used (with a few exceptions) whenever an oath of allegiance is required to be taken by a subject, that is to say, as the general rule, on the acceptance of any of the chief offices of state, or of a judicial appointment in the Supreme Court of Judicature, or of the office of justice of the peace, and the like. The oath of allegiance is also required to be taken by aliens before they can claim the benefits of naturalisation (*k*).

[But besides this express engagement, the law also holds

(*g*) Mirrour, ch. 3, s. 35; Fleta, 3, 16; Britton, ch. 29; *Calvin's Case* (1608), 7 Rep. 6 b.

(*h*) 1 W. & M. (1688), c. 8.

(*i*) The Promissory Oaths Act, 1871, does not affect the *form* of the oath thus settled.

(*k*) Naturalization Act, 1870, s. 9. The oath, as framed by the Promissory Oaths Act, 1868, s. 2, is in the following simple terms:— " I, A. B., do swear that I will be " faithful and bear true allegiance " to her Majesty Queen Victoria, " her heirs and successors, accord- " ing to law. So help me God "; and an affirmation, under the Oaths Act, 1888, is in exactly the same form, except that the introductory words are: "I, A. B., do " solemnly, sincerely, and truly " declare and affirm."

[that there is an implied, original, and virtual allegiance owing from every subject to his sovereign, antecedently to and independently of any express promise. For, as the king, by the very descent of the crown, is fully invested with all the rights, and bound to all the duties, of sovereignty before his coronation, so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; the formal profession of subjection being nothing more than a declaration in words of what was before implied in law. Which occasions Sir Edward Coke very justly to observe, that "all subjects are equally "bounden to their allegiance as if they had taken the "oath; and the taking of the corporal oath is but an "outward declaration of the same" (*l*).

Allegiance, both express and implied, is distinguished by the law into two species, the one natural, the other local. *Natural* allegiance is such as is due from natural-born subjects (*m*); and this is a tie which (subject to a qualification of recent introduction, and presently to be explained) cannot be severed or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature, for *nemo potest exuere patriam*. An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it was a principle of our law, that the natural-born subject of one prince could not by any act of his own,—not even by swearing allegiance to another,—put off or discharge his natural allegiance to the former (*n*). It is true that the natural-born subject of one prince, to whom he owed allegiance, might be entangled by subjecting himself absolutely to another (*o*); but it was

(*l*) 2 Inst. 121.

(*m*) *Calvin's Case* (1608), 7 Rep. 5 b.

(*n*) 1 Hale, P. C. 68.

(*o*) *Marryat* v. *Wilson* (1799), 1 Bos. & Pul. 443.

[his own fault that brought him into these straits and difficulties of owing service to two masters (*p*).

Local allegiance, on the other hand, is such as is due from an alien, or stranger-born, *for so long time as he continues within the king's dominion* (*q*); it ceases the instant such stranger transfers himself from this kingdom to another, because allegiance is a debt due from the subject, upon an implied contract with the prince, that *so long as the one affords protection, so long the other will demean himself faithfully.* As therefore the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, so their allegiance to him is correspondingly universal and permanent. But as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British empire. From which considerations Sir Matthew Hale deduces this consequence, that, though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise any thing against his crown and dignity (*r*); and accordingly we find, in fact, that, even after the true prince has regained the sovereignty, such attempts against the usurper (unless in defence or aid of the rightful king), have been afterwards punished with death, because of the breach of that

(*p*) The operation of the maxim *nemo potest exuere patriam*, is exemplified in the case of *Æneas Macdonald* (A.D. 1746), who was a native of Great Britain, but, having received his education from early infancy in France, and having spent his riper years in a profitable employment in that kingdom, had accepted a commission in the service of the French king. While acting under that commission, he was taken in arms against the king of England, and was indicted therefor and convicted of high treason. He was, however, pardoned upon condition of his leaving the kingdom, and continuing abroad during his life.

(*q*) *Calvin's Case* (1608), 7 Rep. 6 a.

(*r*) 1 Hale, P. C. 60.

[temporary allegiance, which was due to him as king *de facto*.]

The doctrine, however, of the perpetual character of natural allegiance must now be taken with some qualification. For, by the Naturalization Acts of 1870 and 1872, it has been provided, that any British subject who, when in any foreign state and not under any disability, shall have voluntarily *become naturalized* in such state, shall thenceforth be deemed to have ceased to be a British subject, and be regarded as an alien, provision being at the same time made to enable such person, on the same conditions as other aliens, to obtain from the secretary of state a certificate of re-admission to British nationality (*s*). And the Acts also provide, that any person who, by reason of having been born within the dominions of his Majesty, is a natural-born subject, but who also at the time of his birth became, under the law of any foreign state, a subject of that state, and any person who was born out of his Majesty's dominions of a father being a British subject, may make a declaration of alienage, and shall thenceforth cease to be a British subject (*t*).

The capacity of an alien may be enlarged by his becoming a *denizen*, or by his being *naturalized;* and there are, therefore, four distinguishable conditions of subjects, viz., (1) Natural-born subjects; (2) Aliens; (3) Denizens; and (4) Persons naturalized. Some notice shall here be taken of each of these in their order (*u*).

1. *Natural-born subjects.*— All persons born within the limits of the British Empire fall within this descrip-

(*s*) Naturalization Act, 1870, ss. 6, 8. Any British subject who, *before the passing of the Act*, had become naturalized in a foreign state, was enabled to preserve his British nationality by making a declaration of his desire so to do within a limited period, viz., two years after the 12th May, 1870.

(*t*) Sect. 4.

(*u*) See generally on the subject of British nationality, Dicey, *Conflict of Laws*, p. 173.

tion (*x*); and this rule extends even to those born of aliens residing in the dominions of the Crown, provided their parents were not at the time in enmity with our monarch. But if a man be born within the realm, of parents who are alien enemies, or be born (of whatever parents) in a country not parcel of the British dominions, he is an alien by the common law, though, by statute law, important exceptions have been now grafted on this rule; wherefore it became necessary, after the Restoration, to pass a particular Act of Parliament, "for the naturaliza-" tion of children of his Majesty's English subjects born in " foreign countries during the late trouble," *i.e.*, during the Commonwealth (*y*).

The children of the king or queen, however, and the heirs of the crown, wherever born, have always been held natural-born subjects. And the case has always been the same with regard to the children of British ambassadors, born abroad (*z*); for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is accredited, therefore the son is held to be born under the king's allegiance, represented by his father the ambassador. Other very material exceptions have also at divers times been introduced by statute; [for, to encourage foreign commerce, it was enacted, by the 25 Edward III. (1350), st. 1, that all children born abroad, provided *both* their parents were, at the time of their birth, in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England (*a*), and it hath been so adjudged on behalf of merchants (*b*). And by several more recent statutes, the restriction of the common law has been still further relaxed (*c*), so that,

(*x*) *Calvin's Case* (1608), 7 Rep. 18 a.

(*y*) 29 Car. 2 (1677), c. 6.

(*z*) *Calvin's Case, ubi sup.*

(*a*) *Doe* v. *Jones* (1791), 4 T. R. 300.

(*b*) *Bacon* v. *Bacon* (1640), Cro. Car. 601; Mar. 91; Jenk. 3.

(*c*) Foreign Protestants Naturalization Act, 1708; British Nationality Act, 1730; British Nationality Act, 1772.

[now, persons born abroad whose *fathers* or *grandfathers by the father's side* were natural-born subjects, are deemed to be natural-born subjects themselves, to all intents and purposes. But this privilege does not extend beyond the second generation.]

2. *Aliens.*—The rights of aliens, although now largely assimilated to those of natural-born subjects, still present certain distinctions. For, in the first place, as was explained in a former volume (*d*), an alien could not in general inherit lands within this realm, nor had he any inheritable blood, so as to transmit an estate in land, by descent. And though an alien might purchase lands, yet by the old law the king became thereupon entitled to them; for (it was said) if an alien could acquire lands in England, he must owe allegiance to the King of England, and this nation might besides in time become subject to foreign influences and be subjected to other inconveniences. But an alien, being the subject of a friendly state and a merchant, was allowed to hire a house for his habitation, complying with the regulations (contained in the Registration of Aliens Act, 1836) for the registration of aliens (*e*); and an alien friend might always hold personal property and make a will regarding it (*f*). But alien enemies have no rights or privileges whatsoever, unless by the king's special favour (*g*).

(*d*) Vol. i. p. 280.

(*e*) Under exceptional circumstances,—as in times of great political unrest,—the course has been to pass a temporary Act, empowering the secretary of state to order any particular alien to quit the realm. The 11 & 12 Vict. (1848), c. 20, commonly called the "Alien Act," was such an Act, and was re-enacted (and again put in force) by the Prevention of Crime (Ireland) Act, 1882, s. 15.

(*f*) 2 Roll. Rep. 94. Blackstone (vol. i. p. 372) observes, that the old French law in this matter was very different, the king on the death of an alien being held entitled to all he was worth, by the *droit d'aubaine* or *jus albanagii*.

(*g*) The right of action upon a contract, entered into with an alien during peace, is, in general, *suspended* on war being declared against the country of which he is a native (*Alcinous* v. *Nigren* (1854). 4 El. & Bl. 217).

By the Naturalization Act, 1870, it has now been provided, that real and personal property of every description may be acquired, held, and disposed of, by an alien; and that a title to such property may be derived through, from, or in succession to an alien, in the same manner in all respects as by, through, from, or in succession to a natural-born British subject (*h*). This provision, however, is not retrospective (*i*); nor does it qualify an alien for any office, or for any municipal, parliamentary, or other franchise, or entitle him to any rights or privileges as a British subject, except those which by the Act are expressly given to him (*k*). And nothing in the Act is to qualify an alien to be the owner of a British ship (*l*).

3. *Denizens.*—[A denizen is one alien born, but who has obtained *ex donatione regis* letters-patent to make him, to a certain extent, an English subject (*m*). A denizen is in a kind of middle state between an alien and a natural-born subject, and partakes of both of them. He cannot be of the privy council; or become a member of either house of parliament; or hold any office of trust, civil or military (*n*).] The Naturalization Act, 1870, expressly provides, that nothing therein contained shall affect the grant of any letters of denization by her Majesty (*o*); but apparently, as an alien now can, so a denizen also may, hold lands in England.

4. *Aliens naturalized.*—Naturalization may be effected either by private Act of Parliament or by the certificate of a secretary of state. In the first case, naturalization usually confers on the alien exactly the same legal condition as if he had been born in the king's ligeance, and

(*h*) Naturalization Act, 1870, s. 2.

(*i*) *Sharp* v. *St. Sauveur* (1871), L. R. 7 Ch. App. 343.

(*k*) Naturalization Act, 1870, s. 2.

(*l*) Sect. 14.

(*m*) *Calvin's Case* (1608), 7 Rep. 25 b.; *Wilson* v. *Marryat* (1798), 8 T. R. 31.

(*n*) Act of Settlement, 1700, s. 3.

(*o*) Naturalization Act, 1870, s. 13.

has a retrospective effect; so that, if a man is naturalized by Act of Parliament, his son, born before, may inherit through him, independently of the rights in such respect given by the Act of 1870 (*p*). Naturalization by certificate of the secretary of state was introduced for the first time by an Act of 1844, whereby foreigners coming to reside and settle in the United Kingdom were enabled to obtain the advantages of naturalization in a less expensive and tedious way than by procuring a private Act. That statute has now been repealed (*q*); but by the Naturalization Acts, 1870 and 1872, an alien who has either resided in the United Kingdom, or been in the service of the Crown, for not less than five years, and who intends when naturalized either to reside in the United Kingdom, or to serve under the Crown, is enabled to apply for a certificate of naturalization, and the secretary of state, after receiving the necessary evidence in support of the application, may, if he so think fit, issue to the applicant a certificate accordingly. Thereupon, and upon his taking the oath of allegiance (*r*), the alien becomes entitled to all political and other rights, powers, and privileges, and becomes subject to all the obligations, to which a natural-born British subject is entitled or subject (*s*). As regards the children of any such naturalized alien, it appears that, under the Act of 1870, they only become British subjects if either they were born in the dominions of the Crown, or if they are infants at the date of the naturalization of their father, and subsequently reside in the United Kingdom; but by the Naturalization Act, 1895, such children who afterwards reside abroad with their father, while he is in the service of the Crown, are to be deemed naturalized.

And here it may be mentioned, that, long prior to the Naturalization Acts of the present reign, it had been

(*p*) Co. Litt. 129 a.

(*q*) By the Naturalization Act, 1870.

(*r*) See the Naturalization (Oath) Act, 1870.

(*s*) Naturalization Act, 1870, s. 7.

enacted (*t*), that foreign Protestants and Jews, upon their residing seven years in any of the American colonies without being absent above two months at a time, and all foreign Protestants upon their serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, should, upon taking the oaths of allegiance and abjuration, be naturalized to all intents and purposes, as if they had been born in this kingdom (*u*); except indeed as to sitting in parliament, or in the privy council, and as to holding offices or accepting grants from the Crown (*x*).

(*t*) 13 Geo. 2 (1739), c. 7; 20 Geo. 2 (1747), c. 44; 13 Geo. 3 (1773), c. 25,—all repealed by the Naturalization Act, 1870.

(*u*) By 13 Geo. 2 (1739), c. 3, the same effect was made to follow service for two years on board an English ship in time of war; but this statute was repealed by the Statute Law Revision Act, 1867.

(*x*) In the year 1753 was passed the famous Jew Bill (26 Geo. 2, c. 26), to enable all foreigners who were Jews to be naturalized without taking the sacrament; but the popular dislike of it was so great, that it was repealed in the next session, by the 27 Geo. 2 (1753), c. 1. However, by the 6 Geo. 4 (1825), c. 67, the necessity for taking the sacrament on being naturalized was taken away altogether.

CHAPTER III.

OF THE TITLE TO THE CROWN.

[THE fundamental maxim, upon which the right of succession to the throne of this empire depends, seems to be, that the crown is, by common law and constitutional custom, hereditary; and this in a manner peculiar to itself; but that the right of inheritance may from time to time be changed or limited by Act of Parliament; under which limitations the crown still continues hereditary. And it will be the business of this chapter to show, first, that the crown is hereditary; secondly, that it is hereditary in a manner peculiar to itself; thirdly, that this inheritance is subject to limitation by parliament; lastly, that, when it is so limited, it is hereditary in the new occupant (*a*).

1. First, the crown is hereditary, or descendible to the next heir, on the death or demise of the last proprietor; but by this assertion of an hereditary title, a *jure divino* title to the throne is by no means intended, save so far as kingdoms, like other things, are in the disposition of Providence. And all that is intended is, that the hereditary principle is affirmed or declared, by the municipal law of England.

2. Secondly, the mode of inheritance of the crown corresponds in general with the feodal law of descents; for the crown descends, like estates, lineally to the issue of the reigning monarch, and the preference of males to females and the right of primogeniture among the males

(*a*) See Anson, *Law and Custom*, vol. ii., ch. ii., s. 1. (This somewhat curious state of things is, no doubt, the result of an historical conflict between the hereditary and the elective principles, in which neither was completely victorious.)

[are canons of descent which are strictly observed. Also, the crown, on failure of the male line, descends like lands or tenements, to the issue female ; but among the females, the crown descends, by right of primogeniture, to the eldest daughter only and her issue, and not, as in common inheritances, to all the daughters equally as co-parceners (*b*). Again, the doctrine of representation, whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done, prevails in the descent of the crown, as it does in other inheritances ; and, on the total failure of lineal descendants, the crown goes to the next collateral relations of the late sovereign, *provided they are lineally descended from the blood royal.* Nor was there ever any objection to the succession of the half blood, provided only, that the common ancestor were one through whom the blood royal is communicated to each,. Thus, Mary the First inherited to Edward the Sixth, and Elizabeth inherited to Mary ; all children of the same father, King Henry the Eighth, but all by different mothers.

3. Thirdly, the hereditary right may be set aside by Act of Parliament, and a new or modified right of succession may be substituted ; and this is strictly consonant to our laws. For, as the power can nowhere be more properly lodged than in the reigning monarch and the two houses of parliament, therefore in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. But, fourthly, however the crown may, for the time being, stand or be limited, it still retains its descendible quality, becoming hereditary in the wearer in the same manner as it was before hereditary in his predecessor, save and except, of course, so far as in the words of new limitation it is otherwise expressed.

These four points in the law of the hereditary right to the throne are made clear beyond all dispute, when the

(*b*) See Co. Litt. 165 a.

[actual historical succession to the crown is regarded; for we find, that, from the days of Egbert down to the present time, the four cardinal maxims above mentioned have ever been the canons of succession. And although the succession, through fraud or force,—or sometimes of necessity, as when in hostile times the crown descended on a minor,—has been occasionally suspended, yet it has always returned back into the old hereditary channel.

In or about the year 800, King Egbert, by virtue of a long and undisturbed descent from his ancestors of above three hundred years (*c*), was in possession of the throne of the West Saxons; and when he acquired the other kingdoms of the heptarchy, some by conquest and others by a voluntary submission, these latter kingdoms adopted the West Saxon laws and customs. And since the union of the heptarchy in King Egbert, there hath ever been, throughout the whole of England, a general acquiescence in the hereditary monarchy of the West Saxons (*d*). Thus, from Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly, through a succession of fifteen princes of the same royal family, though the course of descent in other respects was subject to some irregularities (*e*). For Edmund Ironside,

(*c*) According to Turner, Egbert succeeded as the only surviving descendant of Cerdic, who at the head of a colony of Saxons had invaded the western parts of the island A.D. 495, and founded what was afterwards called Wessex, or the West Saxon Kingdom. (Turner, *Hist. Anglo-Saxons*, vol. i. pp. 269, 270, 271, 420, 6th edit.)

(*d*) According to Turner, Egbert did not acquire the other Anglo-Saxon kingdoms, except in the sense of establishing the general predominance of Wessex; for "Alfred was the first monarch of "the Anglo-Saxons, and Athel-"stan the first monarch of "England." And "it was not "until Athelstan completely sub-"jugated the Anglo-Danish power, "that the monarchy of England "arose." (Turner, *ubi sup.* vol. i. p. 429; vol. ii. p. 190; vol. iii. p. 173, 6th edit.)

(*e*) With reference to these irregularities, Mr. Hallam says, "The Saxons, like most European "nations, while they limited the "inheritance of the crown exclu-"sively to one royal family, were "not very scrupulous about the

[was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute, King of Denmark; and Canute, after Edmund's death, seized the whole kingdom to himself. In this way the old right of succession was suspended by actual force, and so continued during three reigns; but, upon the death of Hardiknute, the antient Saxon line was restored in the person of Edward the Confessor, who was the surviving son of Ethelred, the father and predecessor of Edmund Ironside (*f*).

On the decease of Edward the Confessor without issue, Harold the Second usurped the throne, while William the Conqueror also claimed the crown, under a pretended gift from Edward the Confessor; whereas in fact the true title to the crown was, all the time, in Edgar Atheling, the son of Edward the Outlaw, and grandson of Edmund Ironside. William the Norman eventually established his claim at the battle of Hastings; and Edgar Atheling's undoubted right was overwhelmed by the violence of the times.

The victory obtained by William the Conqueror at Hastings was a victory over the person of Harold only, and not over the English nation (*g*). Consequently, although William acquired the crown thereby, he acquired it subject to the laws of England; and the title to the crown remained therefore hereditary as before, although in a new stock or root of descent. Accordingly, from William the First (otherwise called the Conqueror), the crown descended to his sons William the Second and Henry the First, the eldest son, Robert, being kept out of possession by the arts and violence of his brothers. This may perhaps have been in accordance with the theory which prevailed for some time in the law of descents (though never adopted as the rule of public succes-

"devolution upon the nearest "heir." (*Mid. Ages.* vol. ii. p. 271, 12th edit.)

(*f*) Turner, *Hist. Anglo-Sax.* vol. ii. p. 355.

(*g*) Hale, *Hist. C. L.* ch. 5; Seld. *Review of Tithes*, ch. 8.

[sions (*h*)), that when the eldest son was already provided for (as in this case where Robert had been constituted Duke of Normandy by his father's will), the next brother was entitled to enjoy the rest of their father's inheritance; but Robert having died without issue, Henry at last acquired a good title to the throne, whatever he might have had at first.

Stephen of Blois, who succeeded to Henry, was indeed the grandson of the Conqueror, by Adelicia, his daughter, and claimed the throne by a feeble kind of hereditary right, that is, not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald, who was Earl of Blois, and who therefore seems to have waived (or certainly never insisted on) so troublesome and precarious a claim. The real right was, however, in the Empress Matilda or Maud, the daughter of Henry the First, the rule of succession being (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. Stephen therefore was little better than a mere usurper, and chose rather to rely on his title by election (*i*); but the dispute between Maud and him was ended by the compromise of Wallingford, whereby Stephen kept the crown, while Henry (the son of Maud) succeeded him. This Henry was (next after his mother) the undoubted heir of William the Conqueror; but he was also lineally descended from Edmund Ironside. For Edward the Outlaw, the son of Edmund Ironside, had, besides Edgar Atheling, who died without issue, a daughter, Margaret, who was married to Malcolm, king of Scotland; and by Malcolm, she had several children, among the rest Matilda, the wife of Henry the First, whose daughter was the Empress Maud, Henry's mother. The Saxon line was, therefore, in a

(*h*) See Lord Lyttleton, *Life of Henry the Second*, vol. i. p. 467.

(*i*) "*Ego Stephanus, Dei gratiâ assensu cleri et populi in regem Anglorum electus, &c.*"—(Cart. A.D. 1136; Ric. de Hagustald. 314; Hearne, *Ad Guil. Neubr.* 711.)

[manner, restored in the person of Henry the Second, although the true hereditary right, under the old Saxon root, was in the *sons* of Malcolm by Margaret.

From Henry the Second, the crown descended to his eldest son, Richard the First, upon whose death, childless, the right vested in his nephew Arthur, the son of Geoffrey his next brother. But John, the youngest son of King Henry, seized the throne, claiming the crown, as appears from his charters, by hereditary right (*k*), that is to say, John was next of kin to the deceased king, being his surviving brother, whereas Arthur was removed one degree farther, being his brother's son, though (by right of representation) he ought to have stood in the place of his father, Geoffrey. It is to be remembered that, in the reign of King Henry the Second, it was a point undetermined, whether, even as regarded the descent of real property, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood (*l*),—a point which long afterwards remained undecided, in the collateral succession to the fiefs of the empire (*m*). However, on the death of Arthur, and his sister Eleanor, without issue, a clear and indisputable title vested in Henry the Third, the son of John: and from him to Richard the Second, a succession of six generations, the crown descended in the true hereditary line. And by the 25 Edw. III. (1350), st. 1, it was declared, "that the law of the crown of England is, " and always hath been, that the children of the King " of England, whether born in England or elsewhere, " ought to bear the inheritance after the death of their " ancestors."

Upon Richard the Second's resignation of the crown, the right resulted to the issue of Edward the Third, the grand-

(*k*) "— *Regni Angliæ, quod nobis jure competit hæreditario.*" —Spelm. *Hist. R. Joh.* (apud Wilkins, 345.)

(*l*) Glanv. l. 7, ch. 3.

(*m*) *Mod. Un. Hist.* xxx. 512.

[father of Richard. Edward the Third had had many children besides his eldest son, Edward the Black Prince, who was the father of Richard the Second; but of these children we need mention only three, namely, William the second son, who died without issue, Lionel Duke of Clarence, the third son, and John of Gaunt, Duke of Lancaster, the fourth son. By the rules of succession, therefore, the posterity of Lionel Duke of Clarence were entitled to the throne upon the resignation of Richard, and had been in fact declared by the king, many years before, to be his presumptive heirs; and that declaration had been also confirmed in parliament (*n*). Inasmuch, however, as Henry Duke of Lancaster, the son of John of Gaunt, had then a large army in the kingdom, it was impossible for any other title to be asserted, and he became king under the title of Henry the Fourth. But, as Sir Matthew Hale remarks (*o*), though the people unjustly assisted Henry the Fourth in his usurpation of the crown, yet he was not admitted thereto until he had declared that he claimed, not as a conqueror,—which he very much inclined to do (*p*),—but as a successor, descended by right line of the blood royal. In order to this, he set up two titles; the one upon the pretence of being the first of the blood royal in the purely male line, the Duke of Clarence having left only one daughter, Philippa, from whom, through a marriage with Edmund Mortimer Earl of March, the house of York descended; the other, by reviving an exploded rumour, that Edmund Earl of Lancaster (to whom Henry's mother was heiress), was in reality the elder brother of King Edward the First, though his parents had, on account of his personal deformity, imposed him on the world for the younger. However, by the statute 7 Hen. IV. (1405) c. 2, it was enacted, that the inheritance of the crown should be and

(*n*) Sandford, *Geneal. Hist.* 246.
(*o*) *Hist. C. L.* ch. 5.
(*p*) Seld. *Tit. Hon.* 1, 3

[remain in the person of Henry the Fourth, and in the heirs of his body issuing; and Prince Henry was declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to the king's other sons, and the heirs of their bodies respectively. The enacting of this statute shows, that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown (*q*); and thereafter the crown descended regularly from Henry the Fourth, to his son and grandson, Henry the Fifth and Henry the Sixth. But in the reign of the latter the house of York re-asserted their dormant title, and at last established it, in the person of Edward the Fourth. It is at the time of this king's accession that we first meet the distinction between a king *de jure* and a king *de facto*. Thus, the 1 Edw. IV. (1461) c. 1, designates Henry IV., Henry V., and Henry VI. as "late kings of England successively, in deed and not of right"; and in all the charters of King Edward, wherever he has occasion to speak of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ.*"

Edward the Fourth left two sons and a daughter. The eldest of these sons, King Edward the Fifth, enjoyed the regal dignity for a very short time, and was then deposed by Richard, his unnatural uncle, who immediately usurped the royal dignity, having previously insinuated to the populace a suspicion of bastardy in the children of Edward the Fourth, in order to make some show of hereditary title; and he is generally believed to have afterwards murdered his two nephews, upon whose death the true right to the crown devolved upon their sister Elizabeth. When the tyrannical reign of King Richard the Third gave occasion to Henry Earl of Richmond to assert his title to the crown,—a title the most remote that was ever set up, and one which nothing could have given

(*q*) 4 Inst. 37, 205.

[success to, but the universal detestation of Richard, who was regarded as a usurper of the rights of the last-mentioned Elizabeth (*r*)—Henry procured from parliament a declaration of his title, and an Act was passed to the effect "that the inheritance of the crown should rest, remain, "and abide in King Henry the Seventh and the heirs of "his body," thereby providing for the future, and acknowledging the present possession, but not determining either way, whether that possession was *de jure* or *de facto* merely. But soon afterwards, Henry married Elizabeth of York, the true heiress of the Conqueror; and thereafter the Act made in his favour was totally disregarded, and was never printed in our statute books (*s*).

Henry the Eighth, the issue of the marriage of Henry the Seventh and Elizabeth, succeeded to the crown by clear indisputable hereditary right, his eldest brother, Prince Arthur, having died without issue; and on his death transmitted the crown to his three children in due order. But in his reign we find the parliament, at several times, occupied in regulating the succession to the kingdom. Thus, first, the 25 Hen. VIII. (1533), c. 22, which recites the mischiefs which had ensued and might ensue by disputed titles, enacts that the crown shall be entailed to his Majesty, and the sons or heirs male of his body; and in default of such sons, to the Lady Elizabeth (who is declared to be the king's eldest issue female, to the exclusion of the Lady Mary, on account of her supposed illegitimacy by the divorce of her mother Queen Catherine), and to the heirs of the body of the Lady Elizabeth; "and so from issue female to issue female, and the heirs of "their bodies, by course of inheritance according to their "ages, as the crown of England hath been accustomed "and ought to go, in case where there be heirs female "to the same: and for default of such issue, then to "the king's right heirs for ever." Afterwards, on the

(*r*) 4 Inst. 37. (*s*) *Ibid.*

[king's divorce from Anne Boleyn, this statute was, with regard to the settlement of the crown, repealed by the 28 Hen. VIII. (1536), c. 7. By this Act the Lady Elizabeth was bastardized as well as the Lady Mary, and the crown was settled on the king's children by Queen Jane Seymour, and his future wives, and, in default of such children, then with this remarkable remainder, "to such persons as the king by letters-patent, or last "will and testament, shall limit and appoint the same." But a few years afterwards, by the 35 Hen. VIII (1543), c. 1, Mary and Elizabeth were again legitimated, and the crown was limited to Prince Edward by name, after that to the Lady Mary, and then to the Lady Elizabeth, and the heirs of their respective bodies. And this succession, which was indeed no other than the usual course of the law with regard to the descent of the crown, took effect accordingly; although the Act still left the king the right of appointing his successor on failure of those three lines.

Lest there should remain any doubt in the minds of the people,—through this jumble of Acts for limiting the succession,—Queen Mary's hereditary right to the throne was acknowledged by the 1 Mar. (1554) sess. 2, c. 1, in these words:—"The crown of these realms is most law-"fully, justly, and rightly descended and come to the "queen's highness that now is, being the very, true, and "undoubted heir and inheritrix thereof." And, again, on the Queen's marriage with Philip of Spain, by the statute which settled the preliminaries of the match, the hereditary right to the crown was again asserted (*t*).

On Queen Elizabeth's accession, her right was also recognized by parliament, and in still stronger terms than her sister's, namely, in the words following:—"the queen's "highness is, and in very deed and of most mere right "ought to be, by the laws of God and the laws and statutes "of this realm, our most lawful and rightful sovereign

(*t*) 1 Mar. sess. 3 (1554), c. 2.

["liege lady and queen; and her highness is rightly, "lineally, and lawfully descended and come of the blood "royal of this realm of England, in and to whose "princely person, and the heirs of her body lawfully to be "begotten, after her, the imperial crown and dignity of "this kingdom are vested, limited, and annexed" (*u*). And by the 13 Eliz. (1571), c. 1, we find the right of parliament to direct the succession of the crown distinctly asserted. This Act provides, that it shall be treason to affirm that the laws and statutes do not bind the right to, and the descent, limitation, and inheritance of, the crown; and that any person who shall, during the queen's life, expressly affirm, before the same is established by parliament, that any particular person is or ought to be heir and successor to the queen, except the same shall be the natural issue of her body, shall, for the first offence, suffer imprisonment and the loss of half his goods, and for the second, incur the penalty of a *præmunire*.

On the death of Queen Elizabeth without issue, the line of Henry the Eighth became extinct; and it became necessary to recur to the other issue of Henry the Seventh by Elizabeth of York. Their eldest daughter Margaret had married King James the Fourth of Scotland, and James the Sixth of Scotland, and the First of England, was the lineal descendant from that alliance; so that in his person, as clearly as in Henry the Eighth, centred all the claims of different competitors, from the Conquest downwards, he being indisputably the lineal heir of the Conqueror. And what is still more remarkable, there also centred in him the right of the Saxon monarchs, which had been suspended from the Conquest, till his succession. For Margaret (sister of Edgar Atheling, daughter of Edward the Outlaw, and granddaughter of Edmund Ironside) was the person in whom the hereditary right of the Saxon kings, supposing it not to have been abolished

(*u*) 1 Eliz. (1558), c. 3.

[by the Conquest, resided. She married Malcolm of Scotland. The royal family of Scotland, from that time downwards, were the offspring of Malcolm and Margaret, of which royal family King James the First of England was the direct lineal heir. James the First, therefore, united in his person every possible claim by hereditary right to the English as well as to the Scottish throne; and it was in virtue of this claim that he succeeded to the throne, notwithstanding that Henry VIII. had, under the above-mentioned Act of 1543, purported to exclude the line of Margaret. And the English parliament did, accordingly, by the 1 Jac. I. (1604), c. 1, "recognize and "acknowledge, that immediately upon the dissolution and "decease of Elizabeth, late Queen of England, the "imperial crown of the realm of England did by inherent "birthright, and lawful and undoubted succession, descend "and come to your most excellent Majesty, as being "lineally, justly, and lawfully, next and sole heir of the "blood royal of this realm" (*x*). The hereditary rights which had so centred in James the First were transmitted to his son and heir, King Charles the First; and from him they descended to King Charles the Second, on whose Restoration in 1660 it was declared by both Houses of Parliament, "that according to their duty and allegiance "they did heartily, joyfully, and unanimously acknowledge "and proclaim, that, immediately upon the decease of our "late sovereign lord, King Charles, the imperial crown of "these realms did, by inherent birthright and lawful and "undoubted succession, descend to his most excellent "majesty, Charles the Second, as being lineally, justly, and "lawfully, next heir of the blood royal of this realm (*y*)."

(*x*) Elizabeth of York, the mother of Queen Margaret of Scotland, was heiress of the House of Mortimer. And Mr. Carte observes, that the house of Mortimer, in virtue of its descent from Gladys, only sister to Llewellin ap Jorwerth the Great, had the true right also to the principality of Wales. (*Hist. Eng.* iii. 705.)

(*y*) Com. Journ. 8th May, 166

[Thus it clearly appears, that the crown of England hath been ever an hereditary crown, though subject to limitations by parliament; and the remainder of this chapter will be chiefly concerned with those instances wherein, since the restoration, parliament hath asserted or exercised this right of limiting the succession, a right which, as we have seen, had been previously asserted in the reigns of Henry the Fourth, Henry the Seventh, Henry the Eighth, Queen Mary, and Queen Elizabeth.

The first instance in point of time, is the famous Bill of Exclusion in the latter end of the reign of Charles the Second, the object of the bill being to set aside the king's brother and presumptive heir, James Duke of York, on the score of his being a papist. But although the bill passed the house of commons, it was rejected in the lords, the king having also declared that he never would consent to it. From this transaction we may collect two things: (1) That the crown was universally acknowledged to be hereditary, and the inheritance indefeasible unless by parliament, and (2) That the parliament could have defeated the inheritance; for the commons acknowledged the hereditary right, and the lords did not dispute the power, but merely the propriety, of the exclusion. However, as the bill took no effect, James the Second succeeded to the throne of his ancestors, and, but for his own infatuated conduct, might have enjoyed it during the remainder of his life. But his own conduct, combining with other circumstances, brought on the Revolution of 1688.

The true ground and principle upon which that memorable event proceeded, was an entirely new one in politics, viz., the abdication of the reigning monarch, and the vacancy of the throne thereupon. For in full assembly of the lords and commons, met together upon the supposition of this vacancy, both houses came to this resolution; —"That James the Second, having endeavoured to sub-" vert the constitution of the kingdom by breaking the

[" original contract between king and people, and having, " by the advice of jesuits and other wicked persons, " violated the fundamental laws, and having withdrawn " himself out of this kingdom, has abdicated the govern- " ment, and that the throne is thereby vacant" (*z*). Further, on the 12th February, 1689, the two houses proceeded to declare on the basis of such resolution, " that " William and Mary, prince and princess of Orange, be " and be declared king and queen, to hold the crown and " royal dignity during their lives, and the life of the " survivor of them ; and that the sole and full exercise of " the legal power be only in, and executed by, the said " prince of Orange, in the names of the said prince and " princess, during their joint lives ; and after their deceases " the said crown and royal dignity to be to the heirs of the " body of the said princess : and for default of such issue, " to the Princess Anne of Denmark and the heirs of her " body ; and for default of such issue, to the heirs of the " body of the said Prince of Orange" (*a*). And this order of succession took effect accordingly.

Towards the end of King William's reign, on the death of the duke of Gloucester, who was the last surviving child of the Princess Anne, the king and parliament thought it necessary again to limit the succession, in order to prevent another vacancy of the throne. The Bill of Rights, 1689, had already enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, or who should profess the popish religion, or marry a papist, should be excluded from and be for ever incapable to inherit the crown ; and the king and parliament now turned their eyes towards the Princess Sophia, electress of Hanover, the most accomplished princess of her age, who was a protestant, and who, as being the youngest daughter of Elizabeth, Queen of Bohemia, daughter of James the First, was the nearest of the antient blood royal, that was

(*z*) Com. Journ. 7th Feb. 1688. (*a*) Com. Journ. 12th Feb. 1688.

[not incapacitated by professing the popish religion. On her, therefore, and the heirs of her body, *being protestants*, the remainder of the crown, expectant on the death of King William and Queen Anne without issue, was settled by the Act of Settlement, 1701 ; and it was at the same time enacted, that whosoever should thereafter come to the possession of the crown should join in the communion of the Church of England, as by law established. And it was subsequently enacted, by the Succession to the Crown Act, 1707, that if any person should maliciously advisedly and directly maintain, by writing or printing, that the kings of this realm are not able (with the authority of parliament) to make laws to bind the crown and the descent thereof, he should be guilty of treason ; and that if he should maintain the same by advised speaking, he should incur the penalties of a *præmunire*.

The Princess Sophia died before Queen Anne, and the inheritance thus limited descended on the former's son and heir, George the First. From him it descended to George the Second ; from him to his grandson and heir, George the Third ;] from him to his son George the Fourth, who was succeeded by his brother William the Fourth ; and from the monarch last mentioned, the crown descended to his heiress, the daughter of his brother Edward Duke of Kent, her late Majesty Queen Victoria, and in the year 1901 from her to her son Edward the Seventh, our present king.

CHAPTER IV.

OF THE ROYAL FAMILY.

[It is to be observed, that when a female sits on the throne of these realms in her own right, she is styled queen *regnant;* and a queen regnant has the same powers, prerogatives, rights, dignities, and duties as if she were a king, as was expressly declared by the 1 Mary I. (1554), sess. 3, c. 1. On the other hand, the wife of a reigning king is styled merely the queen *consort;* but she is, by virtue of her marriage, participant of divers prerogatives above other women (*a*). For, first, the queen consort is a public person, exempt and distinct from the king; and she is, and always has been, of ability to purchase lands and to convey them, to make leases, to grant copyholds, and to do other acts of ownership without the concurrence of her lord (*b*), a privilege as old as the Saxon era (*c*). She is also capable at common law of taking a grant from the king (*d*), in which particular she agrees with the *Augusta* of the Roman laws, who, according to Justinian, was equally capable of making a grant to, and of receiving one from, the emperor (*e*). Moreover, the queen consort of England hath separate courts and offices distinct from those of the king, in matters not only of ceremony but of law; and her attorney and solicitor-general are entitled to a place within the bar of his majesty's courts, together with the king's counsel (*f*). She may also enter into

(*a*) Finch, L. 86.
(*b*) 4 Rep. 23.
(*c*) Seld. *Jan. Ang.* 1, 42.
(*d*) 32 Hen. 8 (1540), c. 51; the Crown Private Estate Act, 1800.
(*e*) Cod. 5, 16, 26.
(*f*) Seld. *Tit. Hon.* 1, 6, 7.

[contracts, and sue and be sued without her husband ; and in all legal proceedings she is looked upon as a feme sole, and not as a feme covert (*g*).

The queen consort hath also many exemptions and minute prerogatives ; for instance, she pays no toll, and is not liable to amercement in any court (*h*). But in general, unless where the law has expressly declared her exempted, she is upon the same footing with other subjects, being to all intents and purposes the king's subject, and not his equal, in like manner as, in the imperial law, "*Augusta legibus soluta non est*" (*i*).

The original revenue of our queens consort, before and after the Conquest, consisted in certain rents exclusively appropriated to her majesty out of the demesne lands of the Crown ; and it was frequent in Domesday Book, after specifying the rent due to the Crown, to add likewise the quantity of gold or other renders reserved to the queen (*k*). And sometimes the particular purpose of the appropriated revenue was specified,—as, *e.g.*, to buy wool for her majesty's use, to purchase oil for her lamps, or to furnish her attire from head to foot (*l*). For a further addition to her income, moreover, the duty of queen-gold (*aurum reginæ*) was originally granted, those matters of grace and favour, out of which it arose, being frequently obtained from the Crown by the powerful intercession of the queen. For queen-gold was due on every voluntary offering or fine to the king amounting to ten marks and upwards, in consideration of any privileges, grants, licences, pardons, or other matters of royal favour, in the proportion of one-tenth of such offering or fine (*m*) ; but it was not payable in respect of any aid or subsidy granted by parliament or convocation, nor on fines imposed by courts on offenders,

(*g*) Finch, L. 86 ; Co. Litt. 133 a. ; and *cf.* the Acts quoted in note (*d*), p. 458.

(*h*) Co. Litt. 133 b. ; Finch, L. 185.

(*i*) Dig. i. 3, 31.

(*k*) Pryn. *Aur. Reg.*, Append. 2, 3.

(*l*) Mag. Rot. Pip. 2 Hen. 2 ; Madox, *Hist. Exch.* 419.

(*m*) Pryn. *Aur. Reg.* 2.

[nor on any voluntary present to the king without consideration moving from him to the subject, nor on any sale or contract whereby the revenues or possessions of the Crown were granted away or diminished (*n*).

There are traces of the payment of queen-gold in Domesday Book, and in the great pipe-roll of Henry the First (*o*) ; it forms a distinct head in the antient Dialogue of the Exchequer (*p*), written about 1178, and now attributed to Richard FitzNeal, who was treasurer to Henry the Second in 1158, and subsequently Bishop of London (*q*) ; and from that time downwards it was regularly claimed and enjoyed by all the queens consort of England till the death of Henry the Eighth. But, after the accession of the Tudor family, the collecting of it was much neglected ; and, there having been no queen consort afterwards till the accession of James the First, a period of nearly sixty years, the very nature and quantity of queen-gold became then a matter of doubt. And when the question was referred by that king to the chief justices and chief baron, their report of it was so very unfavourable, that his consort Queen Anne, though she claimed it, yet never thought proper to exact it. In the earlier part of the reign of Charles the First, a writ for levying it was issued, at the suit of Queen Henrietta Maria (*r*) ; but the proceedings under that writ were lukewarm and ineffective, and at the Restoration, in 1660, it became, in effect, extinct.

Another antient perquisite belonging to the queen consort, mentioned by all our old writers (*s*), and for that reason only worthy of notice, is this, namely :—that on the taking of a whale on the coasts, which is a royal fish,

(*n*) 12 Rep. 21 ; 4 Inst. 358 ; Pryn. 6 ; Madox, *Hist. Exch.* 242.

(*o*) Madox, *Disceptat. Epistol.* 74 ; Pryn. *Aur. Reg.* App. 5.

(*p*) Lib. 2, ch. 26.

(*q*) Pollock and Maitland, *History of Eng. Law* (2nd ed.), vol. i. p. 161.

(*r*) 19 Rym. *Fœd.* 721.

(*s*) Bracton, l. 3. ch. 3 ; Britton, ch. 17 ; Flet. l. 1, cc. 45, 46.

[it shall be divided between the king and the queen, the head only being the king's property, and the tail of it the queen's.

But though the queen consort is in all respects a subject, yet in respect of the security of her life and person she is put on the same footing with the king. Thus it is equally treason under the Statute of Treasons, 1351, to compass or imagine the death of our lady the king's companion, as of the king himself; and to violate the queen consort amounts to the same high crime, as well in the person committing the fact, as in the queen herself, if consenting. And if the queen, whether consort or dowager, be accused of any species of treason, she must be tried by the peers of parliament; as Queen Anne Boleyn was, in the twenty-eighth year of Henry the Eighth.

The husband of a queen *regnant* is her subject, as Prince George of Denmark was to Queen Anne,] and as his late royal highness Prince Albert, (under the title of the Prince Consort,) was to Queen Victoria. His position as a subject was shown by the fact that, under his Act of Naturalization (3 & 4 Vict. c. 2), Prince Albert was required to take the oaths of allegiance and supremacy.

[A queen *dowager* is the widow of a king, and, as such, retains most of the privileges which belonged to her as queen consort, though it is not high treason to conspire her death, or to violate her chastity, the succession to the Crown not being thereby endangered. Yet still, *pro dignitate regali*, no man may marry the queen dowager without special licence from the king, on pain of forfeiting his lands and goods; for this was so enacted in parliament, Sir Edward Coke tells us, in the sixth year of Henry the Sixth, though the statute is not extant, and the point seems doubtful (*t*). A queen dowager, alien born, is entitled by the common law to dower after the

(*t*) 2 Inst. 18; Riley, *Plac. Parl.* 72; Co. Litt. 31.

[king's demise, though, in general, the alien wife of a subject was not entitled to dower (*u*). Again, a queen dowager, if she marry a subject, doth not lose her regal dignity, as peeresses dowager, when commoners by birth, lose their peerage when they marry commoners ; and so Catherine, widow of King Henry the Fifth, though she married a private gentleman, Owen ap Meredith ap Theodore (commonly called Owen Tudor), yet maintained an action against the Bishop of Carlisle by the name of Catherine "queen of England." And the queen dowager of Navarre, who was married to Edmund Earl of Lancaster, brother to King Edward the First, maintained an action of dower, after the death of her second husband, by the name of Queen of Navarre (*x*).

The eldest son of the monarch, the heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the king, are all likewise peculiarly regarded by the laws ; and to compass or conspire the death of the former, or to violate the chastity of either of the latter, is as much treason under the Statute of Treasons, 1351, as to conspire the death of the king, or to violate the chastity of the queen. The reason of this is, because the Prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal with bastardy, and because the eldest daughter of the sovereign is also inheritable as sole heir to the crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters. The heir apparent to the crown is usually made Prince of Wales (*y*) and Earl of Chester, by special creation and investiture, *i.e.*, by letters patent under the great seal ; but, in virtue

(*u*) Co. Litt. 31 b.

(*x*) 2 Inst. 50.

(*y*) This creation has not been confined to the heir apparent, for both Queen Mary and Queen Elizabeth were created by their father, Henry the Eighth, Princesses of Wales,—each of them at the time (the latter after the illegitimation of Mary) being only heir *presumptive* to the crown.

[of being the monarch's eldest son, he is, by inheritance, Duke of Cornwall, without any new creation (*z*).

The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, are little further regarded by the antient laws, than to give them, to a certain degree, precedence before all peers and public officers as well ecclesiastical as temporal. This is done by the 31 Hen. VIII. (1539), c. 10, which enacts that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber, and that the great officers of state therein named shall have precedence above all dukes, *except only such as shall happen to be the king's son, brother, uncle, brother's or sister's son;* and under the description of the king's children, his grandsons are held to be included (*a*). And therefore, when King George the Second created his grandson Edward, the second son of Frederick Prince of Wales deceased, Duke of York, and referred it to the house of lords to settle his place and precedence, they certified that he ought to have place next to the Duke of Cumberland, the then king's youngest son, and that he might have a seat on the left hand of the cloth of estate (*b*). But when, on the accession of King George the Third, those royal personages ceased to take place as the children, and ranked only as the brothers and uncles, of the king, they left their seats on the side of the cloth of estate; so that when the Duke of Gloucester, his majesty's second brother, took his seat in

(*z*) *The Prince's Case* (1606), 8 Rep. 1; *Simpson* v. *Clayton* (1838), 4 Bing. N. C. 758. As to the property of the Prince of Wales, in his duchy of Cornwall, see the Acts specified in App. II. to the Index to the Statutes; as to his mines there, see Cornwall Submarine Mines Act, 1858; and as to the limitation of suits by him in relation to the duchy, see also the Crown Suits Acts, 1769, and 1861, s. 2. As to the expenditure of the heir apparent, see the Heir Apparent's Establishment Act, 1795.

(*a*) 4 Inst. 362.

(*b*) Lords Journ. 24th April, 1760.

[the house of peers (*c*), he was placed on the upper end of the earls' bench (on which the dukes usually sit), next to his royal highness the Duke of York.

In the year 1718, upon a question referred to the judges by King George the First, it was resolved, that the education and care of the king's grandchildren, while minors, did belong of right to his majesty, as king of this realm, even during their father's life (*d*), and further that the care and approbation of their marriages, when grown up, belonged to the king their grandfather; and the judges more recently concurred in the opinion, that this care and approbation extended also to the heir presumptive to the crown, though to what other branches of the royal family the same did extend, they did not find precisely determined (*e*). The most frequent instances of the Crown's interposition, however, go no further than nephews and nieces, although examples are not wanting of its reaching to more distant collaterals; and the alleged (*f*) statute of 6 Hen. VI. (1427), which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it, namely, "because the "disparagement of the queen shall give greater comfort "and example to other ladies of estate, who are of the "blood royal, more lightly to disparage themselves" (*g*).] Therefore, by the 28 Hen. VIII. (1536), c. 18, (repealed by the 1 Edw. VI. (1547), c. 12) it was made treason for any man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paternâ*, or the children of his brothers or sisters. And now, by the Royal Marriage Act, 1772, no descendant of the body of King George the Second, (other than the issue of princesses married into foreign families,) is capable of contracting matrimony without the previous consent of

(*c*) Lords Journ. 10th Jan. 1765.
(*d*) Fortesc. Al. 401—440.
(*e*) Lords Journ. 28th Feb. 1772.
(*f*) P. 461, *supra*.
(*g*) Ril. *Plac. Parl.* 672.

[the monarch, signified under the great seal and declared in council. Any marriage contracted without such consent is void; and all persons solemnizing, assisting at, or being present at, any such prohibited marriage, incur the penalties of the statutes of *præmunire*. Nevertheless, any such descendant who is above the age of twenty-five may, after a twelvemonth's notice given to the privy council, contract and solemnize marriage without the consent of the Crown; unless both houses of parliament shall, before the expiration of the year, expressly declare their disapprobation of the intended marriage.]

CHAPTER V.

OF THE ROYAL COUNCILS, AND OF THE OFFICERS OF STATE.

[THE king, in order to assist him in the discharge of his duties and in the maintenance of his dignity, hath assigned to him a diversity of councils.

1. The first and principal of these is the high court of parliament, which we have already sufficiently considered (*a*).

2. Secondly, all the peers of the realm are by their birth hereditary counsellors of the Crown, and may be called together by the king to impart their advice in matters of importance to the realm, either in time of parliament, or (which hath been their principal use in times past) when there is no parliament in being (*b*). It is laid down in our law books that peers are created for two reasons: (1) *ad consulendum regi* (*tempore pacis*); and (2) *ad defendendum regem* (*tempore belli*). On which account the law gives them certain great and high privileges, such as freedom from arrest in civil cases, even when no parliament is sitting; because the law intends that they are always assisting the king with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valour (*c*).

Instances of conventions of the peers, to advise the Crown, have been in former times very frequent, though

(*a*) *Vide sup.* ch. i. of this Act.

(*b*) Co. Litt. 110a.

(*c*) *Earl of Shrewsbury's Case* (1610), 9 Rep. 49a. See further, as to civil cases, the authorities cited, *sup.* p. 373, note; and, as to criminal proceedings, *sup.* p. 374.

[now fallen into disuse by reason of the more regular meetings of parliament. Sir Edward Coke (*d*) gives us an extract of a record, 5 Hen. IV., concerning an exchange of lands between the king and the Earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament (if any should be called before the feast of Saint Lucia), or otherwise by advice of the grand council of peers, which the king promises to assemble before the said feast, in case no parliament shall be called. Many other instances of this kind of meeting are to be found under our antient kings; though the formal mode of convoking them had been so long left off, that when King Charles the First, in 1640, issued out writs under the great seal to call a great council of all the peers of England to meet and attend his majesty at York, previous to the meeting of the long parliament, the Earl of Clarendon mentions it as a new invention, not before heard of—that is, as he explains himself, so old that it had not been practised for some hundreds of years (*e*). But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together; as was particularly the case with King James the Second, after the landing of the Prince of Orange, and with the Prince of Orange himself, before he summoned that convention parliament which afterwards called him to the throne.

Besides this general meeting, it is usually considered to be the right of each particular peer of the realm to demand an audience of the king, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And, in the reign

(*d*) Co. Litt. 110 a.

(*e*) Hist. b. 2, at p. 223 (ed. 1819).

[of Edward the Second, it was made an article of impeachment against the two Hugh Spencers, father and son, for which they were banished the kingdom, "that they by "their evil covin would not suffer the great men of the "realm, the king's good counsellors, to speak with or to "come near the king; but only in the presence and "hearing of the said Hugh the father and Hugh the son, "or one of them, and at their will, and according to such "things as pleased them" (*f*).

3. A third council belonging to the king is the council of his judges for law matters (*g*). Where, therefore, the king's council is mentioned generally, it must be understood *secundum subjectam materiam*. Accordingly when, by the Statute of Præmunire, 1392, it was made a high offence to import into this kingdom any papal bulls, or other processes from Rome, and the offenders were directed to be attached by their bodies, and brought before the king *and his council* to answer for such offence, the "king's council" was understood to be the judges of his courts of justice, the subject-matter being legal] (*h*). A trace of the "council of judges" is to be found in the writ of attendance which the judges receive at the commencement of each parliament.

[4. But the principal council of the king is his privy council, which is generally called, by way of eminence, *the Council*. And this, according to Sir Edward Coke's description of it, is "a most noble, honourable, and reverend assembly of such as the king wills to be of his privy council in his court or palace" (*i*).

(*f*) 4 Inst. 53.

(*g*) Co. Litt. 110 a.

(*h*) 3 Inst. 125. Coke's interpretation is extremely doubtful. In Coleridge's *Blackstone* (vol. i. p. 229) it is suggested that the "council" referred to was a court of very extensive jurisdiction, both civil and criminal, and was the source from which the Court of Chancery and the Star Chamber sprang. Hale omits the "council of the law" from his enumeration of royal councils, his *concilium ordinarium* being different from Coke's "council of the law."

(*i*) 4 Inst. 53.

[The king's will is the sole constituent of a privy councillor, and regulates also the number of his councillors. In antient times, the number of privy councillors was twelve or thereabouts; but afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch. And therefore King Charles the Second, in 1679, limited it to thirty, of whom fifteen were to be the principal officers of state and councillors *virtute officii*, and the other fifteen were ten lords and five commoners of the king's choosing; but since that time the number has been again much augmented, and now continues indefinite.] No inconvenience, however, arises in modern times from this extension of the number, for with the exception of such of them as are *cabinet ministers*, the privy councillors are not now ordinarily summoned to advise the king; and the cabinet ministers (or cabinet council) are those privy councillors who, being more immediately honoured with the king's confidence, actually conduct the business of the government, and assemble for that purpose from time to time, as the public exigencies require. And it is this council of the cabinet, and not the privy council at large, that is always understood when mention is made of the king's "administration,"—though strangely enough the cabinet is a body unknown to the law, and one whose members are never officially made known to the public, and whose proceedings are not recorded (*k*), except in communications to the king in the shape of a cabinet minute. The members of the cabinet are usually the principal officers of state, namely, the lord high chancellor, the first lord of the treasury, the lord president of the council, the first lord of the admiralty, the chancellor of the exchequer; and the five principal secretaries of state (*l*), viz.—the secretary for the home department, for

(*k*) Macaulay, *Works* (8 vol., 1879), vol. i., p. 166.

(*l*) As to the office of secretary of state, see *Entick* v. *Carrington* (1765), 2 Wils. K.B. 275, at p. 289, and 19 St. Tr. 1030. This case decided that a secretary of state has no right to issue general

foreign affairs, for the colonies, for the war department (*m*), and for India (*n*). The lord privy seal and the president of the board of trade have been members of all the most recent cabinets. The lord lieutenant of Ireland or the chief secretary, one or other, is also always in the cabinet.

Privy councillors are made by the king's nomination, without either patent or grant. On taking the necessary oath or making the necessary affirmation (*o*), they immediately become privy councillors (with the title of "right honourable") during the life of the monarch that chooses them, subject to removal at his discretion.

[The duty of a privy councillor appears from his oath of office (*p*), which is :—1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, need, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be resolved. 6. To withstand all persons who would attempt the contrary. And lastly, in general,

warrants or search warrants to seize the papers of the alleged author of a seditious libel. He may, however, issue a warrant of arrest for high treason (*R.* v. *Oxford* (1840), 4 St. Tr. (N.S.) 497). By the Government of India Act, 1858, s. 4, any four of her Majesty's principal secretaries of state, and any four of the *under secretaries*, may sit and vote as members of the House of Commons; but not more than four of either may sit in the House at the same time. See also the House of Commons (Vacation of Seats) Act, 1864.

(*m*) The office of secretary for the war department was created in 1854 on the occasion of the Crimean war. Before that time there was a secretary *at war* (abolished by the Secretary at War Abolition Act, 1863); but he was not a principal secretary of state. And see generally (as to the secretary for the war department) the Ordnance Board Transfer Act, 1855; the War Office Act, 1870; Order in Council, 21st November, 1895.

(*n*) The Government of India Act, 1858, s. 3.

(*o*) The Oaths Act, 1888.

(*p*) The Promissory Oaths Act, 1868, s. 14.

[7. To observe, keep, and do, all that a good and true counsellor ought to do to his sovereign lord.] There is no salary or allowance attached to the position of a privy councillor, as such.

The privy council at large does not, as we have said, in general assemble to advise on public affairs, but only on occasions of state and ceremony, such as the opening of a new reign. Formal meetings of the council for the discharge of official business are, however, held about eight times a year, the summonses in these cases being confined to a small number of the members of the council. [It forms part of the jurisdiction of the privy council to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But its jurisdiction herein is only to inquire, and not to punish ; and all persons committed by it are entitled to their *habeas corpus* by the 16 Car. I. (1640), c. 10, as much as if they had been committed by an ordinary justice of the peace. By the same statute, the Court of Star Chamber and the Court of Requests, both of which consisted of privy councillors, were dissolved ; and it was declared illegal for the council to take cognizance of any matter of *property* belonging to the subjects of this kingdom.] In addition to its inquisitorial powers, the privy council has also, in certain cases, the *judicial* authority of a court of justice,—that is to say, in causes from the colonies and other British possessions, in appeals from the admiralty and vice-admiralty courts, prize courts, and ecclesiastical courts (*q*), in applications to prolong the term of patents

(*q*) As to the general jurisdiction of the privy council in these matters, see the Privy Council Appeals Act, 1832, and the Judicial Committee Acts, 1833 and 1843. As to the admiralty jurisdiction of the privy council, see more especially the Vice-Admiralty Courts Act, 1863, and the Colonial Courts of Admiralty Act, 1890. Appeals in admiralty matters lie to the King in Council from the Vice-Admiralty Courts of India and

for new inventions (*r*), or in petitions for a grant of a compulsory licence to work a patent or (in the alternative) for a revocation of the patent (*s*), in cases arising out of the Copyright Act, 1842 (s. 5), and in applications by persons aggrieved by schemes prepared for the regulation of endowed schools (*t*).

[As to colonial causes, it is to be observed, that the jurisdiction of the privy council is both original and appellate. For whenever a question arises between two provinces out of the realm, as concerning the extent of their charters and the like, the king in council exercises *original* jurisdiction therein, upon the principles of feudal sovereignty; and so, likewise, when any person claims an island or a province, in the nature of a feudal principality, by grant from the king or his ancestors, the determination of that right belongs to the king in council,—as was the case of the Earl of Cardigan and others, as representatives of the Duke of Montague, with relation to the Island of St. Vincent, in 1764 (*u*).] But the jurisdiction of the

certain British possessions, as also from the Colonial Courts of Admiralty and the Courts acting as Colonial Courts of Admiralty outside the King's dominions (*e.g.* in Cyprus, Constantinople, China). The admiralty jurisdiction of the privy council in appeals from the former High Court of Admiralty (the jurisdiction of which is now vested in the Admiralty Division of the High Court of Justice) was transferred (except as to prize cases) by the Supreme Court of Judicature Act, 1873, s. 18, to the Court of Appeal, from which an appeal lies to the House of Lords. As to appeals in prize cases (which lie to the King in Council from all Prize Courts, whether at home or abroad) see the Naval Prize Act, 1864, and the Prize Courts Act, 1894. As to ecclesiastical appeals (which lie to the King in Council from ecclesiastical courts both at home and abroad) see more particularly the Church Discipline Act, 1840, the Public Worship Regulation Act, 1874, and the Clergy Discipline Act, 1892.

(*r*) Patents, Designs and Trade Marks Act, 1883, s. 25, *vide sup.* p. 29.

(*s*) Patents Act, 1902. Petitions under this Act are presented, in the first instance, to the Board of Trade, which may refer them to the Judicial Committee (*vide inf.*, p. 473).

(*t*) Endowed Schools Acts, 1869 and 1873.

(*u*) For recent examples of the Crown in council deciding inter-colonial differences of the kind referred to in the text, see the

privy council is, for the most part, appellate, an appeal lying to it in the last resort from the judgment or sentence of every court of justice in the colonies, dependencies, and all other British possessions (including the Channel Islands and the Isle of Man), as also from the judgment or sentence of the various courts established by virtue of the Foreign Jurisdiction Acts (*x*), *e.g.*, the Supreme Court for China and Corea (formerly Japan) at Shanghai, the Supreme Court of Cyprus, the Supreme Consular Court for the dominions of the Sublime Ottoman Porte, and many others. Under the provisions of modern statutes, all the judicial authority of the privy council is now exercised by a select number of its members, called the judicial committee, who hear the allegations and proofs, and make their report thereon to his Majesty in council, whose order in council finally determines the matter.

The judicial committee was constituted by the Judicial Committee Act, 1833, which has been amended by various subsequent statutes (*y*). At the present time the judicial committee comprises (1) (by the Judicial Committee Act, 1833, s. 1) the lord president of the council, the lord keeper or first commissioner of the great seal of Great Britain, all privy councillors who have held these offices, and "two other persons being privy councillors" appointed under sign manual; (2) (by the Judicial Committee Act, 1833, s. 30, and the Appellate Jurisdiction

case of Pental Island (Order in Council, January, 1872), and the boundary dispute between the Provinces of Ontario and Manitoba in 1884.

(*x*) Consolidated by the Foreign Jurisdiction Act, 1890.

(*y*) The principal Act (the Judicial Committee Act, 1833) has been considerably altered and extended by the Judicial Committee Acts, 1843, 1844, 1871 and 1881, and by the Appellate Jurisdiction Acts, 1876 and 1887. These Acts also contain a variety of regulations as to the manner of *proceeding* before the judicial committee, and particularly on appeals from India and the colonies. The procedure before the Judicial Committee is largely regulated by the Orders in Council of the 13th June, 1853, 24th March, 1871, 26 June, 1873, and 6 March, 1896.

Act, 1887, s. 4) one or two judges of India or of his Majesty's dominions beyond the seas appointed to attend the sittings of the judicial committee (*z*); (3) (by the Appellate Jurisdiction Act, 1876) four lords of appeal in ordinary, two appointed under section 6 and two under section 14 in place of the judges appointed under the Judicial Committee Act, 1871; (4) (by the Judicial Committee Act, 1881) the present and past lords justices of appeal who are members of the privy council; (5) (by the Appellate Jurisdiction Act, 1887, s. 3) members of the privy council who hold, or have held, high judicial office; and (6) (by the Judicial Committee Amendment Act, 1895) persons who are, or have been, chief justices or judges of certain colonial courts, and are privy councillors, provided that the number of such persons does not exceed *five* at any one time. By the Court of Chancery Act, 1851, s. 16, the quorum of the judicial committee is three. The four lords of appeal in ordinary receive a salary of 6,000*l.* a year each (*a*).

Another important committee of the privy council is the committee appointed for the consideration of matters relating to trade and foreign plantations, commonly called the Board of Trade. The Board of Trade is charged with many miscellaneous duties; among others, the supervision and regulation of railways (*b*), the superintendence of all matters relating to merchant ships and seamen (*c*), and the discharge of various functions under the Acts for the formation of piers and harbours (*d*),

(*z*) These two members receive an allowance of 400*l.* a year each; if only one is appointed, he is allowed to draw both the allowances.

(*a*) Appellate Jurisdiction Act, 1876, s. 6.

(*b*) Railway and Canal Traffic Acts, 1854 to 1894; Railway Regulation Acts, 1840 to 1893.

(*c*) Merchant Shipping Act, 1894, ss. 713—730.

(*d*) General Piers and Harbours Act, 1861; General Piers and Harbours (Amendment) Act, 1862; Harbours Transfer Acts, 1862 and 1865.

and under divers Acts relating to trading companies and other associations (*e*), and to patents and the copyright in designs (*f*), and the like (*g*). And the Board is also charged with the carrying out of the provisions relating to life assurance companies contained in the Life Assurance Companies Acts, 1870 to 1872; it exercises a general control over disputes between masters and workmen under the Conciliation Act, 1896, and also over all proceedings under the Bankruptcy Acts, 1883 to 1890, and under the Companies (Winding-up) Act, 1890; and it administers the Electric Lighting Acts, 1882 and 1888.

Like the Board of Trade, the Local Government Board, the Education Board (*h*), and the Board of Agriculture (*i*) are in their origin committees of the privy council. Another committee, called the Universities Committee of the Privy Council (*k*), exercises certain powers with regard to the amendment or repeal of university statutes. Indeed throughout its history the privy council has been in the habit of doing most of its duties by means of committees. Amongst other duties performed by the privy council may be mentioned the granting of charters to, and the settle-

(*e*) Companies Acts, 1862, 1867 and 1879.

(*f*) Patents, Designs and Trade Marks Acts, 1883 to 1888.

(*g*) In addition to the duties mentioned in the text, the Board also collects and arranges statistical returns exhibiting the extent of the revenues, commerce, manufactures, and other resources of the kingdom, and containing a variety of useful details of a miscellaneous character; see *e.g.* the Cotton Statistics Act, 1868.

(*h*) Formerly (till the Board of Education Act, 1899) the Education Committee, *i.e.* the committee of the Privy Council for receiving applications for aid from the parliamentary grants for the purpose of education. See the School Sites Acts, 1844, 1849 and 1852; the School Grants Act, 1855.

(*i*) Board of Agriculture Act, 1889. Among the powers conferred by this Act on the Board were certain statutory powers formerly exercised by the Privy Council, *e.g.* under the Contagious Diseases (Animals) Acts.

(*k*) The Universities of Oxford and Cambridge Act, 1877. A "Scottish Universities Committee of the Privy Council" was created by the Universities (Scotland) Act, 1889.

ment of schemes for, municipal boroughs; as also the supervision of the general medical council under the Medical Acts, 1858 to 1886 (*l*).

[The dissolution of the privy council depends upon the king's pleasure; and he may, whenever he thinks proper, discharge the whole council, and appoint another. By the common law also, the privy council was dissolved *ipso facto* by the king's demise, as deriving all its authority from him. But now, to prevent the inconvenience of having no council in being at the accession of a new prince, it has been enacted, by the Succession to the Crown Act, 1707, s. 8, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.] The four lords of appeal in ordinary, who are paid members of the *judicial committee*, retain their offices during good behaviour, notwithstanding the demise of the crown. According to modern practice the appointment of the council is renewed on the demise of the crown.

(*l*) Thus the Privy Council hears appeals from a refusal of the Medical Council to recognise a diploma.

CHAPTER VI.

OF THE ROYAL PREROGATIVE.

[By the word prerogative we usually understand that special pre-eminence which the king hath, over and above all other persons, in right of his regal dignity, out of the ordinary course of the common law. And Finch describes the prerogative as being that law in case of the king, which is law is no case of the subject (*a*).] But this first definition has been called too vague ; and it has been said that the prerogative may be more precisely defined as "the discretionary authority of the executive" (*b*), *i.e.*, everything which the king or his servants may do without the authority of an Act of Parliament.

We propose to consider the nature of the royal prerogative generally, pointing out, in the first place, the limits within which it is confined, and the safeguards which our political constitution has provided against its improper exercise.

[Queen Elizabeth, it is true, made no scruple in directing her parliaments to abstain from discoursing of matters of state, saying, that they "ought not to deal, to judge, or to meddle with her prerogative royal" (*c*) ; and her successor, James the First, more than once laid it down in his speeches, that "as it is atheism and blasphemy in a creature to dispute what the Deity may do, so it is presumption and sedition in a subject to dispute what the king may do in the height of his power" (*d*). But,

(*a*) Finch, L. 85.

(*b*) Anson, *Law and Custom*, vol. ii., p. 2.

(*c*) D'Ewes, 645.

(*d*) *King James's Works*, 531, 757.

[according to our antient constitution and laws, the limitation of the regal authority was a principle always recognized in England ; and Sir Henry Finch, in the time of Charles the First, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction in regard to the liberties of the people. For the king, says he, hath a prerogative in all things that are not injurious to the subject ; for in them all it must be remembered that the king's prerogative stretcheth not to the doing of any wrong—*nihil enim aliud potest rex, nisi id solum quod de jure potest* (*e*). And the just limitation of the king's prerogative is indeed essential to the idea of *political* or *civil liberty*.

The political liberty of England has been at times endangered, on the one hand, by overbearing princes, and on the other hand by the promoters of anarchy ; but the vigour of our free constitution has always delivered the nation from these embarrassments or convulsions. And the particular liberties which at different periods have been found most liable to invasion have been, on various occasions, asserted, and maintained, by parliament. The first of these occasions was when the *Great Charter* of liberties was obtained sword in hand from King John, and afterwards confirmed with some alterations, by Henry the Third, his son ; a charter which, as Sir E. Coke observes, was for the most part merely declaratory of the fundamental laws of England (*f*). Next, by the *Confirmatio Cartarum*, 1297 (25 Edw. I.), the Great Charter was directed to be allowed as the common law, and all judgments contrary to it were declared void. Then comes a multitude of subsequent corroborating statutes, from the First Edward to Henry the Fourth (*g*) ; and, after a long interval, the *Petition of Right* (1627), a parliamentary declaration of the liberties of the people assented to by Charles the First, and subsequently, in 1679, the *Habeas*

(*e*) Finch, L. 84, 85 ; Bracton, l. 3, tr. 1, ch. 9.

(*f*) 2 Inst. proëm.

(*g*) 2 Inst. *ubi sup.*

[*Corpus* Act (*h*). To these succeeded the *Declaration of Rights* delivered by the lords and commons to the Prince and Princess of Orange (13th February, 1689), and afterwards (16th December, 1689) enacted in parliament, when they became king and queen, as the *Bill of Rights*, which concludes in these remarkable words,—"And they do claim, "demand, and insist upon, all and singular the premises, as "their undoubted rights and liberties" (*i*). This enactment recognizes all and singular the rights and liberties,

(*h*) The Habeas Corpus Act, 1679, was extended by the Habeas Corpus Act, 1816.

(*i*) By the Bill of Rights, it is asserted:—

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or with their execution, by regal authority, as it had been assumed and exercised of late, is illegal.

3. That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, or for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subject to petition the king, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are protestants may have arms for their defence, suitable to their conditions, and as allowed by law.

8. That the election of members of parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders. (This provision, respecting the qualification of jurors in cases of treason, was, however, repealed by 6 Geo. 4 (1825), c. 50.)

12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

[asserted and claimed in the Bill of Rights, to be the "true, antient, and indubitable rights of the people of this "kingdom." Lastly, these liberties were again asserted at the commencement of the eighteenth century, in the *Act of Settlement*, a statute passed in the twelfth and thirteenth year of the reign of William III. (1700); and at the same era, some new provisions were added for better securing our religion, laws, and liberties (*k*), all which the statute declares to be the "birthright of the "people of England," according to the antient doctrine of the common law (*l*).]

Of the rights and liberties thus asserted, there are two which demand our particular notice, namely, (1) The free dispensation of justice by the ordinary tribunals; and (2) The right of petitioning for the redress of grievances.

1. The free dispensation of justice by the ordinary tribunals.

[The law being the supreme arbiter of every man's life,

(*k*) The Act of Settlement provides—

1. That whosoever shall hereafter come to the possession of this crown shall join in communion with the Church of England as by law established.

2. That in case the crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England, without the consent of Parliament.

3. That judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament, it may be lawful to remove them.

4. That no pardon under the great seal of England, be pleadable to an impeachment by the commons in parliament.

Besides the above provisions, this Act contained others,—

1. Against the monarch going out of the United Kingdom, without consent of parliament. (Repealed by 1 Geo. 1, st. 2 (1715), c. 51.)

2. As to the matters to be transacted in the privy council. (Repealed by 4 & 5 Ann. c. 20 (1705), s. 27.)

3. As to aliens naturalized or made denizens. (For the present law on this subject, *vide sup.* p. 440.)

4. As to officers of the Crown sitting in parliament. (See as to this, *sup.* pp. 399, 400.)

(*l*) Plowd. 55.

[liberty, and property, the courts must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *Magna Carta* (*m*), spoken in the person of the king, who in judgment of law, says Sir E. Coke, is ever present and repeating them in all his courts, are these:—*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justitiam;* "and, therefore, every "subject for injury done to him by any other subject, be "he ecclesiastical or temporal, may take his remedy by "the law, and have justice and right for the injury done "to him, freely without sale, fully without any denial, and "speedily without delay" (*n*). And it would be endless to enumerate all the *affirmative* Acts of Parliament, wherein justice is directed to be done according to the law of the land.

It may be proper, however, to mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. Thus, it is ordained, by *Magna Carta* (*m*), that no freeman shall be outlawed,—that is, put out of the protection and benefit of the laws,—but according to the law of the land. By the 2 Edw. III. (1328) c. 8, and 12 Rich. II. (1388), it is enacted that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law, or to disturb or delay common right; and though such commandments should come, the judges shall not cease to do right,—which is also, by the 20 Edw. III. (1346) c. 4, made a part of their oath. By the Bill of Rights, 1689, it is declared, that the pretended power of suspending laws, or of dispensing with laws, or with the execution of laws, as it had been of late exercised, by regal authority and without consent of parliament, is illegal.

The method of proceeding cannot, any more than the substance of the law, be altered but by parliament; for

(*m*) C. 40 (ed. Stubbs.) (*n*) 2 Inst. 55.

[if once these outworks were demolished, there would be an inlet to all manner of innovations in the body of the law itself. The king, it is true, may erect new courts of justice, but then they must proceed according to the old established forms of the common law (*o*); for which reason it is declared in the 16 Car. I. (1640) c. 10, s. 3 (on the dissolution of the Court of Star Chamber) that neither his majesty, nor his privy council, have any jurisdiction, power, or authority, by English bill, petition, articles, or libel (which were the courses of proceeding in the Star Chamber, borrowed from the civil law), or by any other arbitrary way whatsoever, to examine or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom, but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of law.] To the head now under consideration must also be referred the provisions which have been made to secure the dignity and political independence of the judges; with which object in view, it was enacted, by the Act of Settlement, 1700, that the judges' commissions should be made, not, as formerly, *durante bene placito*, but during good behaviour, *quamdiu se bene gesserint*, but that it might be lawful to remove them on the address of both houses of parliament. And afterwards, by the 1 Geo. III. (1761) c. 23, the judges were continued in their offices notwithstanding any *demise of the crown*, and their full salaries were also absolutely secured to them during the continuance of their commissions.

2. The right of petitioning for the redress of grievances.

[In Russia, there was a law of the Czar Peter, that no subject might petition the throne till he had first petitioned two different ministers of state; and in case he obtained justice from neither, he might then petition the prince, *but upon pain of death if found to be in the wrong* (*p*). But in

(*o*) As to the power of the Crown at the present day to create new courts, see Anson, *Law and Custom*, vol. ii., pp. 449—451.

(*p*) Montesquieu, *Esprit des Lois* xii. 26.

[England the restrictions which are laid upon petitioning are of a nature extremely different; for, while they promote the spirit of peace, they in no way check the freedom of petitioning. Care only is taken, lest, under the pretence of petitioning, the subject be guilty of tumult; for tumultuous petitioning is a criminal offence (*q*).

The prerogatives of the king are now to be considered. And these are either *direct*, or *incidental*; the *direct* being such substantial part of the royal character and authority, as spring from the king's political person, without reference to any extrinsic circumstance, and the incidental being such as exempt the Crown from the general rules which are established for the rest of the community.

The direct or substantive prerogatives are divided into three kinds; being such as regard, first, the royal dignity; secondly, the royal authority; and, thirdly, the royal income. These three prerogatives have been considered necessary to secure reverence to the king's person, obedience to his commands, and an affluent supply for the ordinary expenses of his government. In the present chapter we shall consider only the two first, reserving the third for a subsequent chapter. And we may here observe that the feudal writers distinguished the royal prerogatives into the *majora* and the *minor regalia*, or the *greater* and the *lesser* prerogatives; and that the greater extended to the royal character and royal authority, while the lesser extended to the royal revenue (*r*).

First, then, of the ROYAL DIGNITY.—The law ascribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater

(*q*) 13 Car. 2 (1661), c. 5; Bill of Rights, 1689, and Act of Settlement, 1700. *Vide post*, bk. vi.

(*r*) Peregrin. *De Jure Fisc.* l. 1, ch. 1, num. 9.

[ease to carry on the business of government. These attributes constitute the royal dignity; and three of them must here be specially noticed.

(1) The law ascribes to the king the attribute of *sovereignty*, or pre-eminence. He is said to have imperial dignity; and in charters before the Conquest he is frequently styled *basileus* and *imperator* (*s*). His realm is declared to be an empire, and his crown imperial, by many Acts of Parliament, amongst others 24 Henry VIII. (1533) c. 12, and 25 Henry VIII. (1534) c. 22. Formerly, there prevailed a notion, that an emperor could do many things which a king could not do, and that all kings were in some degree subordinate to the Emperor of Germany or Rome (*t*); the meaning therefore of the legislature, when it useth these terms of empire and imperial, and applies them to the realm and crown of England, is only to assert that our sovereign is equally supreme and independent within these his dominions as any emperor is in his empire, and owes no kind of subjection to any other potentate upon earth.]

By virtue of this prerogative of sovereignty or pre-eminence, it was a maxim of our law, even while the now abolished doctrine of corruption of blood flourished in full vigour, that there could be no corruption of blood in the monarch; for if the heir to the crown were attainted of treason or felony, and afterwards the crown descended to him, this *ipso facto* would purge the attainder (*u*). [Therefore, when Henry the Seventh, who, as Earl of Richmond, stood attainted, came to the crown, it was not thought necessary to pass an Act of Parliament to reverse this attainder; because, as Lord Bacon, in his history of that prince, informs us, it was agreed that the assumption

(*s*) Seld. *Tit. of Hon.* 1, 2.

(*t*) *I.e.* the ruler, or rather the titular head, of the Holy Roman Empire. [When Blackstone wrote, this curious institution was still in existence. It was formally dissolved in 1806. For a brilliant sketch of its history, see Bryce, *Holy Roman Empire*. -E.J.]

(*u*) Finch, L. 82.

[of the crown had at once purged the attainder. Neither can the king, as king, ever be, in judgment of the common law, a minor or under age; and therefore his assent to an Act of Parliament is good, even though he have not, in his natural capacity, attained the legal age of twenty-one (*x*). It hath, however, been usually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian, or regent for a limited time. But the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority, and therefore he hath no legal guardian.] And the appointment of a regent is only an expedient devised to meet a particular contingency; as when a statute in the late reign, the Lords Justices Act, 1837, provided for the administration of the government by lords justices, in case of the next successor to the crown being out of the realm; and as where, in a former reign, the heir apparent was appointed regent while George the Third was disabled by insanity from conducting affairs of state (*y*).

[(2) A second attribute of dignity which the law ascribes to the king, in his political capacity, is, an absolute *immortality*. The king never dies; for Henry, Edward, or George may die, but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity is vested, by act of law, and without any interregnum, in his heir, who is, *eo instanti*, king to all intents and purposes. And so tender is the law of even supposing a possibility of the death of the king, that his natural dissolution is generally called his demise, an expression which signifies merely a transfer of property; or, as is observed in Plowden (*z*), when we say the demise of the Crown, we mean only that,

(*x*) Co. Litt. 43; 2 Inst. proëm.

(*y*) 51 Geo. 3 (1811), c. 1.

(*z*) Plowd. 177, 234.

[in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor.

(3) A third attribute of the royal dignity is *perfection*, it being an ancient fundamental maxim of our law, that *the king can do no wrong*. This maxim is not to be understood as if everything transacted by *the government* was of course just and lawful; its proper meaning is only this, that no crime or other misconduct must ever be imputed to the king *personally*. However tyrannical or arbitrary, therefore, may be the measures pursued or sanctioned by him, he is himself sacred from punishment of every description. For if any foreign jurisdiction had the power to punish him, as was formerly claimed by the Pope, the independence of this kingdom would be no more; and if the power to punish him were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the legislative power. Also, and upon the same principle, no action can be brought against the sovereign, even in civil matters; and indeed, his immunity (*a*), both from civil suit and from penal proceeding, follows from the circumstance that no court can have jurisdiction over him, all jurisdiction proceeding from the Crown itself (*b*).]

But while the king himself is, in a personal sense, incapable of doing wrong, his acts may in themselves be contrary to law and invalid. Thus, for example, his grants, when they are of that description, are avoided or set aside by the law, but in such manner as to maintain the respect due to the Crown. [Thus, if the Crown should be induced to grant any franchise or privilege to a subject, and the grant should be contrary to reason, or in anywise prejudicial to the commonwealth or to any private person,

(*a*) *Tobin* v. *The Queen* (1864), 16 C. B. (N.S.) 310.

(*b*) Finch, L. 83.

[the law will not suppose the king to have meant either an unwise or an injurious action, but declares that the king was *deceived* in his grant; and such grant is thereupon rendered void, but merely upon the foundation of fraud or deception on the part of those agents whom the Crown has thought proper to employ. So, if any person has a just demand upon the king in respect of property or arising out of contract (*c*), though he cannot bring an action against him,] he may petition him in the High Court of Justice (*d*), [and obtain redress; and though in a sense such redress is a matter of grace, and not to be had upon compulsion (*e*), yet a petition of right will not be refused capriciously, and the prayer of it is grantable *ex debito justitiæ* (*f*). This is entirely consonant with what is laid down by the writers on natural law:—"A subject," says Puffendorf, "so long as he continues a subject, hath no "way to *oblige* his prince to give him his due when he "refuses it; though no wise prince will ever refuse to "stand to a lawful contract. And if the prince gives the "subject leave to enter an action against him upon such "contract, in his own courts, the action itself proceeds "rather upon natural equity, than upon the municipal "laws" (*g*). For the end of such an action is not to *compel* the prince to observe the contract, but to *persuade* him.] But as regards any cause of complaint which the subject may have against the Crown in respect of some personal injury of a private kind, being an injury unconnected with property, real or personal, this would seem not to be a proper subject for a petition; and, consequently, no remedy would lie against the Crown in such a case, save

(*c*) *Windsor and Annapolis Rail. Co.* v. *The Queen* (1886), L. R. 11 App. Ca. 615.

(*d*) As to the practice in such cases, see the Petitions of Right Act, 1860.

(*e*) Finch, L. 255.

(*f*) See *Ryves* v. *Duke of Wellington* (1846), 9 Beav. at p. 600.

(*g*) Law of N. & N. b. viii. ch. 10.

under the express provisions of any Act of Parliament which should give some specific remedy (*h*). But, of course, the unlawful command of the Crown is no defence to an action by the party injured against any person carrying out the Crown's commands.

[It is also to be observed, that, notwithstanding the personal perfection which the law attributes to the king, the constitution hath allowed a latitude of supposing the contrary, in respect of both houses of parliament; each of which in its turn hath exerted the right of remonstrating with, and complaining to, the king, even of those acts of royalty which are most properly and personally his own, such as messages signed by himself, and speeches delivered from the throne. Yet, such is the reverence which is paid to the royal person, that, though the two houses have an undoubted right to consider these acts of state in any light whatever, and accordingly to treat them in their addresses as proceeding personally from the prince, yet among themselves, to preserve the more perfect decency and for the greater freedom of debate, they usually suppose them to flow from the advice of his administration. The privilege of canvassing thus freely the personal acts of the sovereign belongs, however, to no individual, but is confined to those august assemblies; and the objections which it is desired to propose in parliament, must be proposed with the utmost respect and deference. One member was sent to the Tower for suggesting, that his majesty's answer to the address of the commons "contained high words to "fright the members out of their duty" (*i*); while another was similarly punished for saying, that "a part of "the king's speech seemed rather to be calculated for the "meridian of Germany than Great Britain, and that the "king was a stranger to our language and constitu-"tion" (*k*).

If it be asked, what remedy is afforded to the subject

(*h*) *Tobin* v. *The Queen* (1864), 16 C. B. (N.S.), 310.

(*i*) Com. Journ. 18th Nov. 1685.

(*k*) *Ibid.* 4th Dec. 1717.

[for such public oppressions or acts of tyranny as have proceeded from the personal delinquency of the monarch himself, the answer is, that there is no more remedy than in the case before supposed of a personal injury inflicted by the sovereign on an individual; for to suppose a remedy in such a case, (that is to say, a *compulsory* remedy,) would be to suppose a superior coercive authority in some other hand, to correct the abuse. For all such abuses, therefore, whether they spring from the sovereign or from either house of parliament, the law is manifestly unable to make provision; but if ever they unfortunately happen, the prudence of the times must provide new expedients upon the new emergencies.

Indeed, it is found by experience, that whenever unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not sacrifice their liberty by a scrupulous adherence to political maxims, which were originally established to preserve it; and, therefore, if any prince should endeavour to subvert the constitution by breaking the so-called "original contract" between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom, it would be permissible to declare, that such a conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant.

In further pursuance of the same principle, the law also determines that in the king there can be no negligence or *laches;* and so the maxim, *nullum tempus occurrit regi*, formerly prevailed on all occasions, no delay in resorting to his remedy being held to bar the king's right (*l*).] From this doctrine it followed, that not only the civil claims of the Crown received no prejudice by the lapse of time, but that criminal prosecutions also might be commenced at any distance of time from the commission of the offence (*m*). From a general point of view, all

(*l*) Co. Lit. 41 b, 90.

(*m*) *R.* v. *Thompson* (1851), 20 L. J. M. C. 183.

this is still law; but in modern times it has been largely qualified by statute, *e.g.*, by the Crown Suits Act, 1769 (as amended by the Crown Suits Act, 1861), the Crown is now barred from its civil right in suits relating to landed property, by the lapse of sixty years; and by the 32 Geo. III. (1792), c. 58 (*n*), it was barred in informations for usurping corporate offices or franchises, by the lapse of six years, or (in *quo warranto* against a municipal corporation) by the lapse of one year (*o*). Again, by the Treason Act, 1695, an indictment for treason, except for an attempt to assassinate the king, must be found within three years after the commission of the act of treason.

[Secondly, of the ROYAL AUTHORITY.—This is a subject which involves a great variety of prerogatives, in the exertion whereof consists the executive part of government. By the British constitution, the executive power is wisely placed in a single hand; for if it were placed in many hands, it would be subject to many wills, and these many wills, if disunited, would create a weakness or vacillation in the government. The king is therefore not only the chief, but properly the sole, magistrate of the nation, all others acting only by commission from and in due subordination to him. The particular prerogatives incident to the executive vested in the king are the following:—

(1) The sovereign has the sole power of sending ambassadors to foreign states (*p*), and of receiving ambassadors at home (*q*). For it is evident, that with regard to foreign

(*n*) Repealed by the Statute Law Revision Act, 1887.

(*o*) Now s. 73 of the Municipal Corporations Act, 1882.

(*p*) As to the salaries, pensions, &c., of those who are in the diplomatic service, see the Diplomatic Salaries Act, 1869.

(*q*) By the 11 & 12 Vict. (1848), c. 108, her majesty was authorized to enter into diplomatic relations with the sovereign of the Roman States; but it was expressly provided by the Act, that no person in holy orders of the Church of Rome, or jesuit, or member of any other religious order, community, or society of that church, bound by monastic or religious vows, should be received as ambassador

[affairs, the sovereign is the delegate or representative of his people ; and, it being impossible for the individuals of a state to transact the affairs of that state with another community equally numerous as themselves, therefore, in the king, as in a centre, all his people are united, and what is done by him, with regard to foreign powers, is, in effect, done by them (*r*).

It will here be convenient to consider, though somewhat concisely, the rights, powers, duties, and privileges of ambassadors, as determined by the law of nations. And first, the municipal law is inapplicable to ambassadors ; but if an ambassador grossly offends, or makes an ill use of his character, he may be sent home and accused before his master (*s*), who is bound either to do justice upon him, or else to avow himself the accomplice of his crimes. There is, however, some dispute among writers on international law, whether this exemption of ambassadors extends to all crimes, as well natural as positive, or whether it extends only to *mala prohibita*, such as coining, and not to *mala in se*, such as murder (*t*). Our law seems to have formerly allowed the exemption in the restricted sense only ; for it has been held, that though an ambassador is privileged by the law of nations, yet, by that law, if he commits any offence against the law of reason and nature, he shall lose his privilege (*u*). Consequently, if an ambassador conspires the death of the king in whose land he is, he may, by our law, be condemned and executed for treason, though if he commits any other species of offence, he must be sent to his own country (*x*) ; and these positions

or diplomatic agent. This statute is one of those which have been repealed by the Statute Law Revision Act, 1875, "as having by change of circumstances become unnecessary."

(*r*) 4 Inst. 152.

(*s*) As was done with Count Gyllenbourg, the Swedish minister to Great Britain, A.D. 1716. (De Martens, *Causes Célèbres*, I., p. 97.)

(*t*) Van Leeuwen in Dig. 50, 7, 17 ; Barbeyrac's Puff. 1, 8, ch. 9, ss. 9 and 17 ; Van Bynkershoek, *De Foro Legator*, cc. 17—19.

(*u*) 1 Roll. Rep. 175 ; 3 Bulstr. 27 ; 4 Inst. 153.

(*x*) 1 Roll. Rep. 185.

[seem to be in full accordance with reason. But the general practice of this country now is to act upon the sentiments of the learned Grotius, that the general security of ambassadors is of more importance than the punishment of some particular crime (*y*); and therefore, since the middle of the seventeenth century, few, if any examples have happened where an ambassador has been punished for any offence, however atrocious in its nature (*z*). In respect to civil suits, neither an ambassador, nor any of his train, can be proceeded against for any debt or contract in the courts of the kingdom to which he is accredited, *i.e.*, in which he is sent to reside (*a*). But few, if any, cases had arisen, wherein the privilege with regard to civil suits was either claimed or disputed, previous to the reign of Queen Anne; when an ambassador from the Czar Peter of Muscovy was actually arrested and taken out of his coach in London, for a debt of fifty pounds, which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the queen. The Czar resented this affront very highly, and demanded that the sheriff of Middlesex, and all others concerned in the arrest, should be punished with instant death (*b*); but Queen Anne directed her secretary to inform him, "that she could "inflict no punishment upon any the meanest of her

(*y*) "*Securitas legatorum, utilitati quæ ex pœnâ est, præponderat.*" —(*De Jure B. et P.* l. 2, ch. 18, s. 4.)

(*z*) In the year 1653 (during the protectorate of Cromwell), Don Pantaleone Sa, the brother and secretary of the Portuguese ambassador, was tried, convicted, and executed for an atrocious murder. (Phillimore, *Inter. Law*, II., 211.)

(*a*) A "secretary of legation," acting in the absence of the ambassador as *chargé d'affaires*, is protected in the same manner as the ambassador himself; and an ambassador does not lose his privilege by engaging even in mercantile transactions (*Taylor* v. *Best* (1854), 14 C. B. 487; *Att.-Gen.* v. *Kent* (1862), 1 H. & C. 30; *Magdalena Steam Navigation Co.* v. *Martin* (1859), 2 El. & El. 94, 109).

(*b*) Com. Journ. 17th September, 1708; Boyer, *Annals of Queen Anne.*

["subjects, unless warranted by the law of the land" (*c*). A bill was, however, brought into parliament, and afterwards passed into law, to prevent the like occurrences for the future (*d*), although the Act was, in fact, merely declaratory of the common law (*e*).

The statute recites the arrest which had "been made "in contempt of the protection granted by her majesty, "and in prejudice of the rights and privileges which "ambassadors and other public ministers have at all "times by the law of nations been possessed of," and enacts, that for the future all writs and process whereby the person of any ambassador, or of his domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void, and that all persons prosecuting, soliciting, or executing such process, are to be deemed violators of the law of nations, and disturbers of the public repose, and are to suffer such penalties and corporal punishment as the lord chancellor and the two chief justices, or any two of them, shall think fit. But no trader, within the description of the bankrupt laws, who shall be in the service of the ambassador, is to be privileged or protected by the Act; and no one is to be punished for arresting the servant of an ambassador, unless the name of the servant shall have been registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex (*f*). The privileges of ambassadors and others, as so declared by that Act, are thus expressly made part of the law of the land, and are allowed as such in the courts of common law (*g*).

(2) It is also the king's prerogative to make treaties,

(*c*) Com. Journ. 11th January, 1709; Boyer, *Annals of Queen Anne*; *Un. Mod. Hist.* xxxv. 454.

(*d*) Diplomatic Privileges Act, 1708.

(*e*) *Viveash* v. *Becker* (1814), 3 M. & S. 284.

(*f*) *Seacomb* v. *Bowlney* (1743), 1 Wils. K. B. 20.

(*g*) *Viveash* v. *Becker*, *ubi sup.* *Musurus Bey* v. *Gadban*, [1894] 1 Q. B. 533; [1894] 2 Q. B. 352.

[leagues, and alliances with foreign states and princes (*h*). For by the law of nations it is essential to the goodness of a treaty that it be made by the sovereign power (*i*); and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul; yet, lest this plentitude of authority should be abused to the detriment of the public, the constitution hath here interposed a check by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation. And the treaty, once made, requires also, in general, an Act of Parliament for its due execution (*k*); certainly so, if it is to affect the private rights of the subject (*l*).

(3) Upon the same principle the king has also the prerogative of making war and peace (*m*); for, by the law of nations, the right of making war, which by nature subsisted in every individual, has become vested in the sovereign power of each community (*n*). And it would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him, against his will, in a state of war. Whatever hostilities therefore may be committed by private citizens, the State ought not to be affected thereby, unless it should justify their proceedings; and such volunteers in violence, being and remaining unauthorized, are not ranked among enemies, but among pirates and robbers. And the reason given by Grotius, why accord-

(*h*) Com. Dig. *Prerogative*, B. 3; Chitty, *Commercial Law*, i. 38, 615.

(*i*) Puff. L. of N. b. 8, ch. 9, s. 6.

(*k*) Behring Sea Award Act, 1894; Greek Loan Act, 1898.

(*l*) *The Parlement Belge* (1879), 4 P. D. 129; 5 P. D. 197, where Blackstone's statement as to the prerogative in this respect is criticised; *Walker* v. *Baird*, [1892] A. C. 491.

(*m*) Com. Dig. *Prerogative*, C. 1, 2, 3; Bac. Ab. *Prerog.* D. 4.

(*n*) Puff. b. 8, ch. 6, s. 8.

[ing to the law of nations a denunciation of war ought always to precede the commencement of hostilities, is not so much that the enemy may be put upon his guard, but that it may be certainly clear, that the war is not undertaken by private persons, but by the will of the whole community (*o*). Accordingly, with us in England, in order to make a war completely effectual, it was formerly necessary that it should be publicly declared and duly proclaimed by the king's authority ; but the modern practice is by no means uniform. In whatever body the right resides of beginning a national war, in that body also must reside the right of ending it, or the power of making peace. But the check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the Crown from a wanton or injurious exercise of this great prerogative.

(4) As delay in declaring war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative, by authorizing the issue by the Crown, upon due demand made, of letters of *marque and reprisal*. The prerogative of granting such letters is nearly related to, and plainly derived from, the larger prerogative of making war ; and the issue of them is in general the mere precursor of a formal denunciation of war. This expedient is justifiable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another, and justice is denied them by that state to which the oppressor belongs (*p*). In such a case, letters of marque and reprisal,—words in themselves synonymous, and signifying a taking in return,—may be obtained, in order to seize, wherever they be found, the bodies or goods of subjects of the offending state, until satisfaction be made.

(*o*) *De Jure B. et P.* l. 3, ch. 3, s. 11.

(*p*) *De Jure B. et P.* l. 3, ch. 2, ss. 4, 5.

[This custom of reprisal seems dictated by nature herself, the sovereign power merely intervening in order to determine when the reprisals may be made; and by the 4 Hen. V. (1416), if any subjects of the realm are oppressed by any foreigners in the time of truce, the king may grant letters of marque in due form, to all that feel themselves grieved. And by virtue of the letters of marque, the aggrieved party may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate.] But the term "letters of marque" is now used in a somewhat different sense, and as applying to the commissions from the king, or from the lords of the admiralty, as his agents, acting under divers statutes, whereby, in time of actual war, in order to encourage merchants and others to fit out privateers or armed ships, the prizes captured by the owners of such ships are made divisible between such owners, including the captains and the crews, instead of belonging to the Crown as *droits* of the admiralty (*q*). And in the Crimean war, although no "letters of marque" were issued to privateers, "general reprisals" were granted against the ships, vessels, and goods of the enemy; in order to give the benefit of the prizes taken by her Majesty's ships to the captors of such prizes (*r*).

(5) [Upon exactly the same reason stands the prerogative of granting *safe-conducts;* without which, by the law of nations, no member of one society has a right to intrude into another (*s*). And therefore Puffendorff very justly resolves (*t*), that it is left in the power of all states to take such measures about the admission of strangers, not being shipwrecked people, as they think convenient. By our laws, great tenderness is shown not only to foreigners in distress, but with regard also to the admission of strangers who come spontaneously; for, so long as their

(*q*) Vin. *Abr. Prerog.* N. a. pl. 22; *Nichol* v. *Goodall* (1804), 10 Ves. 155.

(*r*) Prize Act (Russia), 1854. Since the Declaration of Paris in 1856 the commissioning of privateers has practically fallen into disuse.

(*s*) Com. Dig. *Prerogative*, B. 5.

(*t*) *Law of N. & N.* bk. 3, ch. 3, s. 9.

[own nation continues at peace with ours, they enjoy the right of residence here with other large privileges. But no subject of a nation at war with us can come into this realm, or travel himself upon the high seas, or send his goods and merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which by divers antient statutes were to be granted under the great seal and inrolled in chancery, or else they were of no effect (*u*). Passports under the king's sign manual, or licences from his ambassadors abroad, are, however, now more usually obtained, and are allowed to be of equal validity.

The law of England, a commercial country, has ever paid a very particular regard to foreign merchants. Thus, by Magna Carta, (cap. 41 (*v*)), if a war breaks out between their country and ours, they shall, if in England, be attached without harm of body or goods, till the king or his chief justiciary be informed how our merchants in their country are treated; and if our merchants be well entreated there, theirs shall be likewise with us. This rule seems, indeed, to have been a common rule of equity among all the northern nations (*x*). But it is somewhat extraordinary that it should have found a place in Magna Carta, a mere interior treaty between the king and his natural-born subjects: which occasions the learned Montesquieu to remark with a degree of admiration, "that the English "have made the protection of *foreign* merchants one of "the articles of their national liberty" (*y*). But indeed, it well justifies another observation which he has made, "that the English know better than any other people "upon earth, how to value at the same time these three "great things, religion, commerce, and liberty" (*z*).

(*u*) 15 Hen. 6 (1436), c. 3; 18 Hen. 6 (1439), c. 8; 20 Hen. 6 (1441), c. 1; *The Hoop* (1799), 1 Rob. (C.) 196.

(*v*) Clause xxx in the confirmation of 25 Edw. 1 (1297).

(*x*) Stiern *De Jure Sueon.* l. 3, ch. 4.

(*y*) *Esprit des Lois*, 20, 14.

(*z*) *Ibid.*, 20, 7.

[(6) The monarch, as being a constituent part of the supreme legislative power, has (though at the present day only in theory) the prerogative of rejecting such provisions in parliament as he judges improper to be passed. The expediency of this particular prerogative has been before evinced at large (*a*) ; we shall, therefore, only mention here, that the Crown is not in general bound by Act of Parliament, unless named therein by special and particular words (*b*),—the most comprehensive words that can be devised not affecting the king, so as to restrain or diminish in the least any of his rights or interests (*c*). It would, indeed, be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed, without its own express consent, by constructions and implications of the subject. But where an Act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with any established rights of the Crown, it is binding as well upon the ruler as upon the subject (*d*). Further, the king may take the benefit of any Act, though he be not specially named therein (*e*).

(7) The king is considered, in the next place, as the first in military command within the kingdom ; and in this capacity, he has the sole power of raising and regulating fleets and armies. This prerogative was solemnly declared, by the 13 Car. II. (1661), stat. 1, c. 6, to be in the king alone ; the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, being thereby recognised as the undoubted right of his majesty, and his royal predecessors, kings and queens of England. This statute, it will be observed, extends not only to fleets and armies, but also to forts,

(*a*) *Vide sup.* pp. 365, 366.

(*b*) Bac. Ab. *Prerogative*, E. 5.

(*c*) *Magdalen College Case* (1616), 11 Rep. 66 *b* ; *In re Henley & Co.* (1878), 9 Ch. D. 469 ; *Re Oriental Bank* (1884), 28 Ch. D. 643.

(*d*) *Magdalen College Case, ubi sup.*

(*e*) *Case of Fine Levied by the King* (1604), 7 Rep. 32.

[and other places of strength within the realm; for the sole prerogative as well of erecting, as of manning and governing these, belongs to the king in his capacity of general of the kingdom (*f*). And this prerogative has, in modern times, been aided by divers statutes (*g*). By the old common law, moreover, the lands of private individuals were, in general, subject to a tax, for building of castles wherever the king thought proper; this was indeed one of the three things, from contributing to the performance of which no lands were exempted, being one of the three obligations which constituted the "*trinoda necessitas*,—"scil., *pontis reparatio*, *arcis constructio*, *et expeditio contra* "*hostem*" (*h*).

It is partly upon the same, and partly upon a fiscal foundation, in order to secure his marine revenue, that the king has the prerogative of appointing *ports* and *havens*, that is, such places as he in his wisdom sees proper, for persons and merchandize to pass into and out of the realm (*i*). By the feodal law, all navigable rivers and havens were computed among the *regalia*, and were subject to the sovereign of the state (*k*). And in England, it hath always been holden, that the king is lord of the whole shore (*l*), and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm (*m*); for, as early as the reign of King John, we find that ships

(*f*) 2 Inst. 30; Com. Dig. *Prerogative*, C. 4.

(*g*) See the 23 & 24 Vict. (1860), c. 109 (since repealed), an Act for defraying the expenses of constructing fortifications for the protection of arsenals and dockyards, and of erecting a central arsenal; also the Defence Act, 1860, an Act for making better provision for acquiring land for the defence of the realm; and the Naval Defence Act, 1889, an Act to make further provision for *naval defence* and to defray the expenses thereof. See also the National Defence, and Imperial Defence, Acts, 1888, the Military Lands Acts, 1892 and 1897, and the Military Works Act, 1897.

(*h*) Cowell, *Interpr.* tit. *Castellorum Operatio;* Seld. *Jan. Ang* 1, 42.

(*i*) Hale, *de Portibus Maris.*

(*k*) 2 Feud. t. 26; Craig, 1, 15, 15.

(*l*) F. N. B. 113.

(*m*) Dav. 9. 56. Among these, the five ports of Hastings, Romney, Hythe, Dover and Sandwich were known as the *cinque ports;*

[were seized by the king's officers for putting in at a place that was not a legal port (*n*). Legal ports were undoubtedly at first assigned by the Crown, since to each of them a court of *portmote* was incident, the jurisdiction of which must have flowed from the royal authority (*o*). The *great ports* of the sea are also referred to, as well known and established, in the 4 Hen. IV. (1402), c. 20, which prohibits the landing elsewhere under pain of confiscation; and the 1 Eliz. (1559), c. 11, recites that the franchise of lading and discharging had been frequently granted by the Crown.

But though the king had a power of granting the franchise of havens and ports, yet he had not the power of narrowing and confining the limits of such ports and havens when once established, but any person had a right to load or discharge his merchandize in any part of the haven; whereby the revenue derived from the customs was much impaired and diminished by fraudulent landings

and extensive privileges were conferred on these ports by our early monarchs, particularly by William the Conqueror and King John. Winchelsea and Rye were subsequently added to the number of the cinque ports; and these seven ports being (by reason of their situation) more immediately exposed to attacks from the French coast, were supposed to be among the most important places in the kingdom, and were placed under the special custody of a *lord warden*. Before the Reform Act, 1832, they sent (together with certain boroughs attached to them) no less than sixteen members to parliament. At one time, the lord warden of the cinque ports and the constable of Dover castle had, also, a local jurisdiction in relation to civil suits and proceedings — a jurisdiction which was, however, taken away by the Cinque Ports Act, 1855 (amended by the Cinque Ports Acts, 1857 and 1869); but the jurisdiction of the lord warden as admiral of the Cinque Ports is expressly saved by s. 256 of the Municipal Corporations Act, 1882. These ports also still possess a peculiar maritime jurisdiction exercised by their Admiralty Court, the jurisdiction of which is expressly saved by the Cinque Ports Act, 1821, the Municipal Corporations Act, 1883, s. 13, and the Merchant Shipping Act, 1894, s. 571. See as to *quarter sessions* within the cinque ports, Municipal Corporations Act, 1882, s. 248.

(*n*) Madox, *Hist. Exch.* 530.

(*o*) 4 Inst. 148. (This argument is exceedingly doubtful.—E. J.).

[in obscure and private corners. This abuse occasioned divers statutes to be passed enabling the Crown to ascertain the limits of ports, and to assign proper quays therein for the exclusive landing and loading of merchandize (*p*);] and this duty, as well as that of appointing ports and sub-ports, and of declaring their limits, is now confided, by the Customs Consolidation Act, 1876, s. 11, to the commissioners of his Majesty's Treasury (*q*). There are also, with regard to ports and harbours, several other Acts of importance. By the Harbours Act, 1745, certain nuisances in harbours are restrained; by the Public Harbours Act, 1806 (amended by the Harbours Transfer Act, 1862, s. 15), no pier, quay, wharf, jetty, breast, or embankment is to be erected in or near to any public harbour in the United Kingdom or any river communicating therewith, so far as the tide flows up the same, without one month's notice to the Board of Trade, with a saving, however, of the privileges of the city of London; and by the Harbours Act, 1814, the Admiralty is entrusted with the duty of regulating the mooring of vessels in all ports and harbours (*r*). By the Harbours, Docks, and Piers Clauses Act, 1847, the provisions ordinarily inserted in local Acts passed for the construction and improvement of particular harbours, docks, and piers, are consolidated into a single statute, so as to be embodied, by way of reference, in any special Harbour Act without needless repetition; and, with the object of obviating the necessity of obtaining, at great expense, a special local

(*p*) 1 Eliz. (1559), c. 11, and 14 Car. 2 (1662), c. 11, both repealed by 6 Geo. 4 (1825), c. 105.

(*q*) By the Customs Consolidation Act, 1876, the commissioners may appoint "warehousing ports" (sect. 12), and "sufferance wharves" (sect. 14), for the purpose of the customs.

(*r*) By the Harbours Act, 1814, ss. 14, 16, the duty of regulating the manner in which *ballast* or *shingle* may be taken from the shores or banks of ports and harbours was also entrusted to the Admiralty; but the jurisdiction was, by s. 16 of the Harbours Transfer Act, 1862, transferred to the Board of Trade.

Act for such construction, the Board of Trade is now enabled by the General Pier and Harbour Act, 1861, as amended by the General Pier and Harbour Act, 1861, Amendment Act (1862), and the Harbours Transfer Act, 1862, to make provisional orders authorizing the construction of any pier, harbour, quay, wharf, jetty, or excavation by private undertakers, upon application made to the Board (*s*). But such orders are of no validity or force until confirmed by Act of Parliament.

[The erection of beacons, lighthouses, and sea-marks is also incident to this branch of the royal prerogative; whereof the first were antiently used in order to alarm the country in case of the approach of an enemy, and all are signally useful in guarding and preserving vessels at sea, by night as well as by day. And for this purpose the king hath exclusive power, by commission under his Great Seal (*t*), to cause beacons, lighthouses, and sea-marks to be erected in fit and convenient places (*u*), as well upon the lands of the subject, as upon the demesnes of the Crown (*x*).] A power, however, of the same general nature is now, by statute, vested also in certain bodies subordinate to the Crown; viz., in the Trinity-house, for England and Wales and the Channel Islands; and for Scotland, the Isle of Man, and Ireland, respectively, in other authorities (*y*). And since the regulation of beacons, lighthouses, and sea-marks falls chiefly under the jurisdiction of these last-mentioned bodies, the subject shall be postponed until we arrive at that division of the work in which some notice is taken of the Trinity-house and of the other Lighthouse Authorities (*z*).

(*s*) Such orders may also empower the undertakers to levy rates and borrow money for such works; and funds in aid of the works may be advanced out of the consolidated fund, and by the Public Works Loan Commissioners.

(*t*) 3 Inst. 204; 4 Inst. 148.

(*u*) Rot. Claus. 1 Rich. 2, m. 42; Prynne on 4 Inst. 136.

(*x*) Sid. 158; 4 Inst. 149.

(*y*) Merchant Shipping Act, 1894, Part II.

(*z*) *Vide post*, bk. IV. pt. III.

To this branch of the prerogative may also be referred the power vested in the Crown by the Customs Consolidation Act, 1876, of prohibiting, by proclamation, or order in council, the *importation* of arms, ammunition, gunpowder, or other goods (*a*), or the *exportation*, and the carriage *coastwise*, of the articles above specified, or of military and naval stores, or of any provisions capable of being used as food by man (*b*).

[To the same head belongs also the right which the king has, whenever he sees proper, of confining his subjects within the realm, or of recalling them when beyond the seas. For although, by the common law, every man may go out of the realm for whatsoever cause he pleaseth, without obtaining the king's leave (a liberty which was expressly declared in King John's great charter, though left out in that of Henry the Third (*c*)), yet, inasmuch as every man ought of right to defend the king and his realm, the king at his pleasure may by his writ command him that he go not beyond the seas or out of the realm without licence; and in such case, he shall be punished if he disobey the writ. And there were in old days some persons who, by reason of their stations, were under a perpetual prohibition of going abroad without licence obtained; among whom were reckoned all peers, on account of their being councillors of the Crown, all knights, who were bound to defend the kingdom from invasions, all ecclesiastics, who were expressly confined by the fourth chapter of the constitutions of Clarendon, on account of their attachment, in the times of popery, to the see of Rome, and all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures (*d*). But, at the present day, everybody has, or at least assumes, the liberty of going abroad when he pleases, and without licence; and the writ *ne exeat regno* is no longer resorted

(*a*) Sect. 43.
(*b*) Sect. 138.
(*c*) F. N. B. 83.
(*d*) Britton, ch. 123.

[to for state purposes. It is now used only to prevent one of the parties to an action from withdrawing his person or property from the jurisdiction of the court by going abroad, unless he shall first give security for the satisfaction of such claim as the other party shall establish (*e*). But possibly, even at the present day, disobedience to a writ of *ne exeat regno* would be a high contempt of the royal prerogative: and it is said, that, in such case, the offender's lands shall be seized till he return, and that he is then liable to fine and imprisonment (*f*).

(8) Another capacity in which the king is considered in domestic affairs, is as the fountain of justice, and general conservator of the peace of the kingdom (*g*); but, by the fountain of justice, the law does not mean that the king is the *author* or *original*, but only the *distributor*, and as it were the steward of the public, to dispense justice to whom it is *due*.] The power of judicature has been usually committed to certain select magistrates; and in England, these magistrates are considered as in some sense the substitutes of the Crown, the king himself still remaining, according to the prerogative now under consideration, the fountain of that justice which they administer. Hence it is, that the jurisdiction of all courts is now either mediately or immediately derived from the Crown, the magistrates or judges who preside therein are all appointed by the authority of the Crown, and the proceedings run generally in the king's name, pass under his seal, and are executed by his officers. [Indeed, it is probable, that in very early times, the king in person often heard and determined causes between party and party; but at present, and by consequence of the long and uniform usage of many ages, our monarchs

(*e*) *Ex parte Brunker* (1734), 3 P. Wms. 312; *Dick* v. *Swinton* (1813), 1 V. & B. 371; *Goodman* v. *Sayers* (1821), 5 Madd. 471; *Sobey* v. *Sobey* (1873), L. R. 15 Eq. 200; *Drover* v. *Beyer* (1879), 13 Ch. D. 242.

(*f*) 1 Hawk. P. C. 22

(*g*) Bac. Ab. *Prerog.* D.; Com. Dig. *Prerog.* D. 28.

[have delegated their whole judicial power to the judges of their several courts (*h*), and (as Sir Edward Coke declared in 1607) may no longer interfere with the regular conduct of business therein.

In regard to criminal proceedings, it would, indeed, be absurd if the king personally intervened, because, in regard to these, he is the *prosecutor*, all offences being considered as having been committed either against the king's peace or against his crown and dignity ; and it was formerly necessary in every indictment so to describe them. For though, in their consequences, they generally seem to be rather offences against the kingdom than against the king, yet since the public has delegated all its powers and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to those powers and breaches of those rights are immediately offences against that magistrate. And this notion was carried so far in the old Gothic constitution (wherein the king was bound by his coronation oath to conserve the peace), that, in case of any forcible injury offered to the person of a fellow-subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath (*i*). Hence arises also another branch of the prerogative, that of *pardoning* offences ; for it is reasonable that he only who is injured should have the power of forgiving. Of prosecutions and pardons, however, more will be said hereafter ; they are mentioned here, only to show the constitutional grounds of this power of the Crown, and how regularly connected all the links are, in this vast chain of prerogative. The *remission of penalties* for criminal offences is also a branch of this prerogative of the sovereign (*k*).

A consequence of the particular prerogative now under

(*h*) 2 Hawk. P. C. 1.

(*i*) Stiern., *de Jure Sueon.* l. 3, ch. 3.

(*k*) The Remission of Penalties Acts, 1859 and 1875 ; *Todd* v. *Robinson* (1884), 12 Q. B. D. 530 ; *Bradlaugh* v. *Clarke* (1883), L. R. 8 App. Ca. 354.

[consideration is the legal *ubiquity* of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice therein (*l*). From this ubiquity, it follows that the king can never be *nonsuited* (*m*); though the attorney-general may enter a *non vult prosequi*, which has much the same effect. For the same reason also, in the forms of legal proceedings, the king is never said to appear by attorney, as other men may do; for, in contemplation of the law, he is always present in court (*n*).

From the same original, of the king's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in him alone. These royal proclamations have a binding force, but only when they are grounded upon and enforce the laws of the realm (*o*). For though the making of laws is entirely the work of the legislative branch of the supreme power, yet the manner, time, and circumstances of putting those laws in execution, must frequently be left to the discretion of the executive magistrate. And therefore it is that royal proclamations are binding upon the subject, where, neither contradicting the old laws, nor tending to establish new ones, they enforce only the execution of such laws as are already in being. For example, the established law is, that the king may prohibit any of his subjects from leaving the realm; a proclamation, therefore, forbidding this in general, for three weeks, by laying an embargo upon all shipping in time of war, has been held equally binding as an Act of Parliament (*p*). But a proclamation laying an embargo, in time of peace, upon all vessels laden with wheat, contrary to the 22 & 23 Car. II. (1671), c. 13, would be an illegal proclamation (*q*). It was, however, once enacted by the Statute of Proclamations (1539), that the king's

(*l*) Fortesc. ch. 8; 2 Inst. 186.
(*m*) Co. Litt. 139 b.
(*n*) Finch, L. 81.
(*o*) 3 Inst. 162. *Case of Proclamations* (1610), 12 Rep. 74.
(*p*) 4 Mod. 177, 179.
(*q*) 7 Geo. 3 (1767), c. 7. This Act, as also the Act of Charles, is now repealed.

[proclamations made with the assent of his council should have the force of Acts of Parliament—a statute which, as being calculated to introduce the most despotic tyranny, was repealed almost as soon as made, *i.e.*, about eight years afterwards (*r*).]

(9) The king is also, as *parens patriæ*, invested with a kind of guardianship over various classes of persons who from their legal disability stand in need of protection (*s*). And this branch of the prerogative extends to *infants*, who have been sufficiently noticed already (*t*), and also to *idiots* and *lunatics*. These we will now consider.

[An *idiot* (or natural fool) is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any; but none is to be held such who hath any glimmering of reason (*u*). The custody of an idiot and of his lands was formerly vested in the lord of the fee (*x*); but, by common consent, it was afterwards given to the king as the general conservator of his people (*y*). The prerogative in this matter is declared by the *De Prærogativâ Regis* in the reign of Edward II. (1324), which, in affirmance of the common law (*z*), directs that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and finding them necessaries; and that after the death of such idiots he shall render the estate to the heirs, in order to prevent such idiots from alienating their lands, and their heirs from being disinherited. This statute extends to the goods and chattels also (*a*), but not to the copyhold lands (*b*), of idiots.

By the old common law, there was a writ *de idiotâ inquirendo*, to inquire whether a man were an idiot or

(*r*) 1 Edw. 6 (1547), c. 12.

(*s*) *De Manneville* v. *De Manneville* (1804), 10 Ves. 52.

(*t*) *Vide sup.* bk. ii. pt. iii. ch. iv.

(*u*) F. N. B. 233; *Ball* v. *Mannin* (1829), 3 Bligh (N.S.) 1.

(*x*) Fleta, lib. 1. ch. 11, s. 10.

(*y*) F. N. B. 232.

(*z*) 4 Rep. 126.

(*a*) *Beverley's Case* (1604), 4 Rep. 126 a; F. N. B. *ubi sup.*

(*b*) Bac. Ab. *Idiots* C.

[not (*c*) ; which question was tried by a jury of twelve men. And if they found him *purus idiota*, the profits of his lands and the custody of his person belonged to the king, who might have granted them to any subject he pleased (*d*) ; but no grievance of this kind ever now occurs, for that part of the prerogative which relates to idiots has been long merged in the part of the prerogative which relates to lunatics, to the consideration of which we will now proceed (*e*).

A *lunatic* is a person who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason (*f*), or has become *non compos*, that is, of mind so unsound as to be incapable of conducting himself or his affairs. And the term *non compos* is the more legal, the term lunatic being in its derivation applicable only to one that hath lucid intervals, though now used technically, as well as popularly, in the more extended sense, of a person affected by any species of insanity supervening since his birth. To all lunatics, as well as to idiots, the king is guardian ; but, in the case of lunatics, the law always imagines that the lunacy may determine, and therefore only constitutes the Crown a trustee to protect the property, accounting to the lunatic for the profits received, if he recover, or, after his decease, to his representatives. And, by the *De Prærogativâ Regis* of Edward II., it is declared, that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use when they come to their right mind ; and further, that the king shall take nothing to his own use, but that the residue, on the death of the lunatic dying in his lunacy, shall go to his or her executors or administrators.]

(*c*) F. N. B. 232.

(*d*) 4 Inst. 203.

(*e*) Under s. 341 of the Lunacy Act, 1890, "lunatic" (where not inconsistent with the context) includes "idiot."

(*f*) "*Idiota a casu et infirmitate.*" —Mem. Scacc. 20 Edw. 1 (in Maynard, *Year Book of Edward* 2), 20.

[The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of both idiots and lunatics is intrusted (*g*), upon petition or information, grants a commission in the nature of the old writ *de lunatico inquirendo*, (which is analogous to that *de idiotâ inquirendo* before mentioned,) to inquire into the party's state of mind ;] and the proceedings on such commission are now regulated by the Lunacy Act, 1890, which repeals, but in substance re-enacts, the three earlier Lunacy Acts of 1853, 1862, and 1882 (*h*). Under this Act, as amended by the Lunacy Act, 1891, and the orders and rules made thereunder (*h*), the commission is general, and is directed to certain judicial officers called Masters in Lunacy (*i*) ; but the inquiry into the state of mind of the party, as authorized by such commission, usually takes place before a *jury* (*j*) on an issue directed by the lord chancellor to be determined in that manner (*k*). The verdict on such inquisition must be upon the oath of twelve men at the least (*l*) ; and, except in special cases, the verdict is to be given after the due examination of the alleged lunatic, both before the taking

(*g*) 3 P. Wms. 107 ; 2 Atk. 553 ; 3 Atk. 635.

(*h*) The orders and rules under the Lunacy Act, 1890, were, first, the Rules of 1890 (dated the first July, 1890), now repealed ; and secondly, the Rules of 1892 (dated the 6th Feb. 1892), which latter are still in force, but have been added to by the Order of 11th Aug. 1892, and the Rules of 15th June, 1893, and various later dates.

(*i*) Lunacy Act, 1890, s. 112.

(*j*) On the other hand, where the alleged lunatic does not demand an inquiry before a jury, or where the lord chancellor is satisfied (by personal examination), that the lunatic is incompetent to form and express a wish in that behalf, the masters in lunacy may, without a jury, inquire into the party's state of mind, and certify their finding thereon. (Sects. 91, 92.)

(*k*) Lunacy Act, 1890, s. 94. Unless the judge trying such issue shall otherwise direct, no evidence as to anything said or done *at any time more than two years before the inquiry*, is receivable in proof of the insanity. (Sect. 98.)

(*l*) As to such jury and as to the trial of the issue, see Lunacy Act, 1890, ss. 97, 99, 100 ; and as to a new trial, or a fresh inquiry, see sect. 103.

of the evidence, and also at the close of the proceedings, before they consult as to their verdict (*m*), the examination being either in open court or in private, as the judge trying the issue shall direct (*n*). And if by the verdict the party be found *non compos*, the care of his *person*, with a suitable allowance for his maintenance (*o*) in some private or public asylum where an asylum is requisite, is usually committed to some friend, who is then called his *committee* (*p*). [In order to prevent sinister practices, the next heir is seldom permitted to be the committee of the *person*, because it is his interest that the party should die. But it has been said that the same objection does not lie against his next-of-kin, provided he be not also his heir; for it is supposed to be his interest to preserve the lunatic's life, in order to increase the personal estate, by the savings which he or his family may hereafter be entitled to enjoy (*q*). The heir is generally made the manager or committee of the *estate*, it being clearly his interest by good management to keep it in condition; but he is accountable to the court, and to the *non compos* himself, if he recovers, and otherwise, to his administrators (*r*).]

(*m*) Sect. 94.

(*n*) *Ibid.*; *In re Scott* (1884), 27 Ch. D. 116.

(*o*) *In re French* (1868), L. R. 3 Ch. 317.

(*p*) See Lunacy Act, 1890, ss. 108, 116. The civil law agreed with ours in assigning to persons of unsound mind curators to manage their persons and estates; but, in one respect, the Roman law went much beyond the English. For if a man, by notorious prodigality, was in danger of wasting his estate, he, too, was committed to the care of a curator (Dig. 27, 10, 1); but with us, when a man is an *unthrift*, no proceedings are taken (Bro. Abr. *Idiot*, 4), and yet the property may be protected by the appointment of a committee of the *estate*, although there is no such lunacy as necessitates a committee also of the *person*.

(*q*) *Ex parte Ludlow* (1731), 2 P. Wms. 638. A portion of the lunatic's estate will sometimes be directed to be applied towards the maintenance of the next of kin if in needy circumstances. (*In re Frost* (1870), L. R. 5 Ch. 699; *In re Evans* (1882), 21 Ch. D. 297; *In re Weaver*, *ib.* 615.)

(*r*) The committee is empowered in many cases to represent or act for the lunatic (Lunacy Act, 1890, ss. 116, 120, 125, 126, 128, and

Moreover, every person found by inquisition to be lunatic is to be personally visited, seen, and reported upon, by official *visitors*, four times at the least in every year, and at such other times as the lord chancellor may direct (*s*); and the statute law contains, also, a variety of other provisions for the protection and management of persons who are lunatic. But the consideration of these provisions shall be reserved for a subsequent division of this work (*t*).

[(10) The king is likewise the fountain of honour, of office, and of privilege. It is impossible for any government to be maintained without a due subordination of rank; for how otherwise shall the people know and distinguish such as are set over them, so as to yield them due respect and obedience? And as the law supposes that no one can be so good a judge of merit as the king himself, it has, therefore, intrusted to him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. Hence, all degrees of nobility and of knighthood, and all other titles and distinctions, are received by immediate grant from the Crown; expressed either in writing, by writs or letters patent, as in the creation of peers and baronets, or by corporeal investiture, as in the creation of a simple knight.] And the law prohibits all subjects of the realm from accepting any title or decoration from a foreign prince, unless with the consent of their own monarch.

[From the same principle also arises the prerogative of erecting and disposing of offices; for honours and offices are in their nature convertible and synonymous. All offices under the Crown carry, in the eye of the law,

133—143); and as to *charging* the lunatic's property for his benefit, see ss. 117, 118; and *In re Plenderleith*, [1893] 3 Ch. 332. But cf. *In re Clarke*, [1898] 1 Ch. 336.

(*s*) Where the real and personal property of the lunatic is of small amount (under 200*l*.), the county court judge may, under certain circumstances, make orders for its application for the lunatic's benefit (Lunacy Act, 1890, s. 132).

(*t*) *Vide post*, bk. IV. pt. III.

[an honour with them, being supposed to be always filled with those that are most able to execute them; and, conversely, all honours, in their original, had offices annexed to them, an earl (*comes*) having been the conservator or governor of a county, and a knight (*miles*) having been bound to attend the king in his wars. For the same reason, therefore, that honours are in the disposal of the king, offices ought to be so likewise. And as the king may create new titles, so he may create new offices, but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices (*u*); for this would be a tax upon the subject, which cannot be imposed but by Act of Parliament (*x*). Upon the same or the like reason, the king has also the prerogative of conferring privileges upon private persons, such as granting place or precedence to any of his subjects, as shall seem good to his royal wisdom (*y*)]; but he cannot, on the creation of a peer, give him precedence before others of the same rank, the power of the Crown in that respect being restrained by the 31 Hen. VIII. (1539), c. 10, which settles the place and precedence of all the nobility and great officers of state.

In connection with this branch of the prerogative, it may also be mentioned, that by the Civil List Act, 1837, Queen Victoria was empowered to grant *pensions* to the amount of 1,200*l.* per annum, chargeable on her civil list revenues, in order to make provision for the support of persons who either had just claims on the royal beneficence, or who might have merited the gratitude, while they needed the aid, of their country (*z*); and the provisions of the Act of 1838 are continued by the Civil List

(*u*) Com. Dig. *Prerog.* D. 37.

(*x*) 2 Inst. 533.

(*y*) 4 Inst. 361.

(*z*) Pensions granted by parliament for distinguished services are now subject to commutation (Pensions Commutation Acts, 1871, 1876, and 1882); and all the Acts authorizing the issue of *secret service money* for *home* service have now been repealed (Secret Service Money (Repeal) Act, 1886). As to issues for *foreign* service, see s. 25 of the Civil List and Secret Service Money Act 1782.

Act, 1901, during the present reign, except that the pensions are not to be granted as chargeable on the Civil List.

[(11) Another light in which the law of England considers the king, with regard to domestic concerns, is as the arbiter of commerce; and the royal prerogative, so far as it relates to this subject, will fall principally under the following articles.

First, the establishment of public MARTS, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging (*a*); all which can only be set up either by virtue of the royal grant, or by long and immemorial usage and prescription, which supposes such a grant to have been originally made (*b*), or else by Act of Parliament (*c*).

Secondly, the regulation of WEIGHTS AND MEASURES. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or test. It is therefore necessary to have recourse to some visible, palpable, material standard, by forming a comparison with which, all weights and measures may be reduced to one uniform size. The prerogative of fixing such a standard our antient law vested in the Crown, as in Normandy it belonged to the duke (*d*); and this standard which was originally kept at Winchester, was, by the laws of King Edgar (*e*), near a century before the Conquest, directed to be observed throughout the realm.

Most nations have regarded the standard of measures of

(*a*) *Vide sup.* vol. i. pp. 405—7.

(*b*) 2 Inst. 406; and *vide sup.* vol. i. pp. 421—5.

(*c*) *Manchester Corporation* v. *Lyons* (1882), 22 Ch. D. 287; *Abergavenny Commissioners* v. *Straker* (1889), 42 Ch. D. 83.

(*d*) Gr. Coustum. ch. 16.

(*e*) Cap. 8.

[length, by comparison with the parts of the human body, as the palm, the hand, the span, the foot, the cubit, the ell, the pace, and the fathom (*f*). But as these are of different dimensions in men of different proportions, our antient historians inform us, that a new standard of longitudinal measure was ascertained by King Henry the First, who commanded that the *ulna*, or antient ell (which answers to the modern *yard*) should be made of the exact length of his own arm (*g*). And, by the statute called *Compositio ulnarum et perticarum*, five yards and a half make a perch; and the yard is subdivided into three feet, and each foot into twelve inches, which inches will be each of the length of three grains of barley. Superficial measures are, of course, derived by squaring those of length; and measures of capacity by cubing them.

The standard of *weights* was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called the grain; thirty-two of which are directed, by the statute called *Compositio mensurarum*, to compose a pennyweight, whereof twenty make an ounce, twelve ounces a pound, and so upwards.

The first standards having been thus originally fixed by the Crown, their subsequent regulation has been, in general, entrusted to parliament. Thus, under Richard the First, in his great council holden at Westminster (A.D. 1197), it was ordained, that there should be only one weight and one measure throughout the kingdom (*h*); and that the custody of the assize, or standard of weights and measures, should be committed to certain persons in every city and borough. It is from this that the antient office of the king's aulnager seems to have been derived, whose duty it

(*f*) A cubit (*cubitus*) is the distance from the elbow to the extremity of the middle finger, *i.e.*, the fourth part of a well-proportioned man. A fathom (derived from a Saxon word) is the space to which a man can extend with both arms. (Johnson's Dict.)

(*g*) Will. Malmsb. in Vita Hen. I.; Spelm. Hen. I. apud Wilkins, 299.

(*h*) See also Magna Carta (1297), c. xxv.

[was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the 11 & 12 Will. III. (1699), c. 20. These original standards were called *pondera regis* (*i*), and *mensuræ domini regis* (*j*), and were directed by a variety of subsequent statutes to be kept in the exchequer, and all weights and measures were to be made conformable thereto. But, as Sir Edward Coke observes, though this had been often by authority of parliament enacted, yet it could never be effected, so forcible is custom with the multitude (*k*).] In our own times, however, new parliamentary enactments have from time to time been devised on the subject, and other weights and measures have been substituted for those which antiently obtained; and by the Weights and Measures Act, 1878 (*l*), a fresh effort was recently made to promote the desirable objects of simplicity and uniformity in this important matter, the Act repealing almost the whole of the enactments previously in force on the subject (*m*).

After providing generally that the same weights and measures shall be used throughout the United Kingdom (*n*), the Act of 1878 enacts, that the standards of *measure and weight* described in the schedules thereto

(*i*) Plac. 35 Edw. 1, apud. Cowell, *Interpr.* tit. *Pondus regis.*

(*j*) Flet. 2, 12.

(*k*) 2 Inst. 41.

(*l*) The Act has been amended by the Weights and Measures Act, 1889, which provides for all weighing instruments being verified and stamped by an inspector of weights and measures. See also the Weights and Measures Acts, 1892 and 1893.

(*m*) The repealed statutes include the Weights and Measures Act, 1824 (with the exception of sect. 25, which refers only to liquors imported into the city of Loudon); 6 Geo. 4 (1825), c. 12; 5 & 6 Will. 4 (1835), c. 63; 18 & 19 Vict. (1855), c. 72; 22 & 23 Vict. (1859), c. 56; 24 & 25 Vict. (1861), c. 75, s. 6; 27 & 28 Vict. (1864), c. 117; and 29 & 30 Vict. (1866), c. 82.

(*n*) Weights and Measures Act, 1878, s. 3. By one of the previous statutes (5 & 6 Will. 4 (1835), c. 63), an attempt had been made in the same direction by abolishing the use of the "Winchester bushel," as well as of all other "local and customary measures."

shall continue to be the imperial standards for determining the length of a yard, and the weight of a pound (*o*). It then proceeds to lay down certain careful regulations by which these standards shall be made subservient to the object of correctly ascertaining the length of the yard, which is to be the only unit or standard measure of extension from which all others shall be ascertained ; and the weight of the pound, which is to be the only unit or standard measure of weight from which all other weights, and all measures having reference to weight, shall be ascertained. And with regard to the unit or standard measure of capacity, from which all other measures, as well for liquids as for dry goods, are to be ascertained, the Act provides, that it shall be the gallon containing ten imperial standard pounds weight of distilled water in such manner as described in the Act (*p*). Moreover, every contract having reference to weight or measure is to be deemed to be made according to the imperial weights or measures ascertained by the Act, and if otherwise made is to be void (*q*) ; and the use of local or customary measures, and of the heaped measure, in common use previously to to the Act, is expressly prohibited, and the seller made liable to a penalty. But these provisions do not extend to render unlawful the use of the *metric* system to be presently mentioned (*r*). The Act further contains a regulation, that all articles sold by weight shall be sold by *avoirdupois* weight, except gold, silver, platinum, diamonds, or other

(*o*) The imperial standard yard is a solid square bar of bronze or gun metal ; and the standard for determining the weight of a pound is of platinum in the form of a cylinder, with a groove or channel round it for the insertion of the points of the ivory fork by which it is to be lifted. (First Sched. pt. 1.)

(*p*) Weights and Measures Act, 1878, s. 15. As to the verification of *local* standards, and the official inspection from time to time of the weights and measures which are in use, see ss. 37, 40—49.

(*q*) Sect. 19. By the Sale of Gas Act, 1859 (amended by the Sale of Gas Act, 1860, and the Metropolis Gas Act, 1861), special regulations are made as to the measures to be used in the sale of *gas*.

(*r*) Weights and Measures (Metric System) Act, 1897, s. 1.

precious stones, which may be sold by *troy* weight (*s*), and drugs, which, when sold by retail, may be sold by *apothecaries* weight (*s*); and further, that it shall be penal for any person to sell by any denomination of weight or measure, other than one of the imperial weights or measures, or some multiple or part thereof (*t*). But it being considered expedient, for the promotion and extension of our internal as well as our foreign trade, and for the advancement of science, to legalize, without making compulsory, the use of the *metric* system of weights and measures, the Act contains a provision on this subject, and sets forth a table containing the equivalents of imperial weights and measures expressed in terms of the metric system. And the Act declares, that such table may be lawfully used for computing and expressing in weights and measures, weights and measures of the metric system (*u*); and the Weights and Measures (Metric System) Act, 1897, s. 2, contains other provisions in the same direction. The power given by s. 2 of the Act of 1897, to make a metric standard, has been exercised by Order in Council of the 19th May, 1898 (*v*). In conclusion, we may observe, that the custody of the standards and the general carrying out of the whole system is now entrusted to the *Board of Trade*, and not, as at one time, to the exchequer and the treasury (*x*).

[Thirdly, MONEY being the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority and to make it current. Money is the sign of value; and metals, being durable and capable of many subdivisions, are well calculated for this sign, a precious metal especially so, being the scarcest and most portable.] In all civilized countries, therefore, it is the

(*s*) Weights and Measures Act, 1878, s. 20.

(*t*) *Ibid.*, s. 19.

(*u*) Sect. 18. The table in sched. 3 to the Act of 1878 is now replaced by that contained in the schedule to the Order in Council of 19th May, 1898. (St. R. & O., 1898, No. 411.)

(*v*) St. R. & O., 1898, No. 410.

(*x*) Sect. 33.

metals which are used for money (*y*) ; and for this purpose they are first *coined*, or fabricated into certain pieces by public authority, which declares at what value, in relation to other known pieces or quantities of metal, they are to be taken (*z*).

[With respect to coinage in general, there are three things to be considered, namely, the materials, the impression, and the denomination. With regard to the materials, it is laid down by Sir Edward Coke, that the money of England must either be of gold or silver (*a*). And, indeed, none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by King Charles the Second, and ordered by proclamation to be current in all payments under the value of sixpence, but not otherwise ;] and recently (1861), instead of pure copper, coins composed of *bronze* or other mixed metal have been authorised as current coin of the realm. Payment in silver or in copper (bronze) coin is only a legal tender up to a certain amount ; it being provided by the Coinage Act, 1870, s. 4, that gold coin shall be the only legal tender, except as regards sums not exceeding forty shillings, which may be tendered in silver coins, or not exceeding the sum of one shilling, which may be tendered in bronze coins. But a Bank of England note, payable to bearer on demand, is, of course, a legal tender, by force of the Bank of England Act, 1833, s. 6.

[As to the impression, the stamping of money is the unquestionable prerogative of the Crown ; for, though

(*y*) The circulating medium in this country consists, not only of coin, but of paper, that is, of notes of the Bank of England, and of a few other banks ; but as these notes are convertible at the pleasure of the holder into coin, the circulating medium is (in effect) exclusively metallic.

(*z*) By the Coinage Act, 1870, s. 11 (8), her Majesty may direct the establishment of a branch of the Mint *in any British possession*, and determine the extent to which coins issued therefrom are to be current and a legal tender. See further as to mints in British possessions, Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 28—30 ; and, as to coinage in the Colonies, Chalmers, *Colonial Currency* (1893).

(*a*) 2 Inst. 577.

[divers bishops and monasteries had formerly the privilege of coining money, yet, as Sir Matthew Hale observes, this was usually done by special grant from the king, or by prescription, which supposes such grant (*b*), and therefore was derived from, and not in derogation of, the royal prerogative.

The denomination, or value for which the coin is to pass current, is likewise in the breast of the king; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together; and when a given weight of gold or silver is of a given fineness, it is then of the true standard, and called *esterling* or *sterling* metal (*c*), a name for which there are various reasons given, but none of them entirely satisfactory (*d*). Of this sterling or esterling metal, all the gold and silver coin of the kingdom must, by the 25 Edw. III. (1351) c. 13, be made (*e*); so that the

(*b*) 1 Hale, P. C. 191.

(*c*) Coinage Act, 1870, ss. 3, 16, 17. See also Weights and Measures Act, 1878, ss. 8, 34, 36, sched. 2. The standard of gold and silver has frequently varied, but is now thus settled, in accordance with what was provided by 56 Geo. 3 (1816), c. 68:—The pound troy of gold, consisting of twenty-two carats fine, and two of alloy, is divided into $46\frac{4}{11}$ sovereigns, or into 46*l.* 14*s.* 6*d.*; and the pound troy of silver, consisting of eleven ounces and two pennyweights pure, and eighteen pennyweights alloy, is divided into sixty-six shillings. (See Coinage Act, 1870, 1st sched.)

(*d*) See Spelm. *Gloss.* 203; and Ducange, III. 165. The most plausible opinion seems to be that adopted by these two etymologists, viz., that the name was derived from the *Esterlingi*, or Easterlings, as those Saxons were antiently called, who inhabited that district of Germany, afterwards occupied by the Hanse towns and their appendages, and who were the earliest traders in modern Europe.

(*e*) The ascertainment of whether coin is of the proper standard is called *pixing* it; and there are occasions on which resort is had, for this purpose, to an antient mode of inquisition called the *trial of the pyx*, before a jury of members of the Goldsmiths' Company. (See Coinage Act, 1870, s. 12.) For information on this subject, see Archæologia, vol. xvi.; Ruding, *Annals of the Coinage.* The constitution of the Mint was remodelled in the year 1815, and again in 1870, when the Chancellor of the Exchequer for the time

[royal prerogative extends not to the debasing or enhancing the value of the coin, below or above the sterling value (*f*), though Sir Matthew Hale was of the contrary opinion (*g*). The king may also, by his proclamation, legitimate foreign coin, and make it current here (*h*), declaring at what value it shall be taken in payment, by comparison with the standard of our own coin (*i*) ; he may, moreover, at any time decry, or cry down, any coin of the kingdom, and make it no longer current (*k*).] But, though the regulation of the coinage thus forms part of the prerogative of the Crown, it is nevertheless a subject over which parliament also exercises a control ; and since the Revolution, it is under the authority of parliament that the coinage has been in fact principally regulated (*l*).

[(12) The king is, lastly, considered by the laws of England as the head and supreme governor of the Established Church. To enter into the reasons upon which this prerogative is founded, is matter rather of divinity than of law ; it will be sufficient, therefore, to observe that, by the Act of Supremacy of 1534, it is enacted, that the king shall be reputed the only supreme head, on earth, of the Church of England, and shall have annexed to the imperial Crown of this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities to the said dignity of the supreme head of the Church appertaining. This Act was repealed under Queen Mary ; but the Act of Supremacy passed in the first year of Elizabeth (1558) required the queen to be acknowledged as supreme in all causes, as well ecclesiastical as temporal. By virtue of this supremacy it is the king that convenes,

being was made the *Master of the Mint* ; the custody of the standard weights committed to the Board of Trade ; and the general superintendence of the Mint entrusted to the Treasury, who appoint a Deputy Master of the Mint (Coinage Act, 1870, ss. 13—15).

(*f*) 2 Inst. 577.
(*g*) 1 Hale P. C. 194.
(*h*) Coinage Act, 1870, s. 11 (7).
(*i*) 1 Hale P. C. 197.
(*k*) *Ibid.*
(*l*) As to *offences* relating to the coin, *vide post*, bk. VI.

[prorogues, restrains, regulates, and dissolves all ecclesiastical synods, or convocations. This was, indeed, an inherent and antient prerogative of the Crown, as appears by the 8 Hen. VI. (1429) c. 1, and the many authors (both lawyers and historians) vouched by Sir Edward Coke (*m*). The convocations, or ecclesiastical synods, in England, differ considerably in constitution from the synods of other Christian kingdoms; these latter consisting wholly of bishops, while the English convocations (of which there are two, one for the province of Canterbury, the other for that of York) are more in the nature of parliaments, all the beneficed clergy having representatives therein, who share with the bishops and other dignitaries such rights as the convocations possess. This constitution is said to be owing to the policy of Edward the First; who at one and the same time let into these assemblies the inferior clergy, and introduced a method of taxing ecclesiastical benefices by consent of convocation (*n*).]

All deans and archdeacons are members of the convocation of their province; each chapter sends one proctor or representative; and in the province of Canterbury the beneficed parochial clergy send two proctors for each *diocese;* but on account of the small number of dioceses in the province of York the beneficed clergy of that province elect two proctors for each *archdeaconry;* and the metropolitan chapter there elects two proctors instead of only one. There are two distinct houses of either convocation, of which the archbishop and bishops form the upper house, and the deans, archdeacons, the proctors for the chapters, and the proctors for the parochial clergy the lower (*o*). The convocations, however, can make no *canons*, or even confer for that purpose, without licence from the sovereign; nor can they make any repugnant to the

(*m*) 4 Inst. 322, 323. See also 25 Hen. VIII. (1534), c. 19.

(*n*) Gilb. *Hist. of Exch.* ch. 4.

(*o*) As to non-residentiary prebendaries not being able to vote at the election of a proctor, see *Randolph* v. *Milman* (1868), L. R. 4 C. P. 107.

common or statute law. And none of their canons bind the laity unless they pass both houses of parliament (*p*). Although, till the 15 Car. II. (1663) c. 10, the beneficed clergy continued formally to tax themselves in convocation, they have not done so since that time; it being now judged more advantageous to include them in the money bills passed by the commons, and to allow them on the other hand to vote for members of parliament, a privilege that did not before belong to them; and they have long ceased to exercise any legislative power (*q*).

[From this prerogative, of being the head of the Church, arises also the king's right of nomination to vacant bishoprics, and to certain other ecclesiastical preferments, a subject which will more properly be considered when we come to treat of the Church (*r*); it is sufficient at present to observe, that this right now rests upon the 25 Hen. VIII. (1534) c. 20.

As head of the Church, the king is likewise the ultimate court of appeal (*dernier ressort*) in all ecclesiastical causes, the Judicial Committee of his Privy Council now hearing all such appeals (*s*).]

(*p*) As to the canons of convocation passed in 1603, see *Middleton* v. *Crofts* (1736), 2 Atk. 650; and as to the canons of 1640, see *Elphinstone* v. *Purchas* (1870), L. R. 3 Adm. and Eccl., at p. 83.

(*q*) As to convocations, see 4 Inst. 322; Gilb. *Exch.* ch. 4; Burn, *Eccl. Law*, *Convoc.*; Com. Dig. *Convoc.*; Hallam, *Constit. Hist.* vol. 3, pp. 236, 324 (3rd edit.).

(*r*) *Vide post*, bk. IV. pt. II. ch. I.

(*s*) *Vide sup.* p. 471.

CHAPTER VII.

OF THE ROYAL REVENUE.

WE now proceed to examine the king's fiscal prerogatives, or royal revenue, which revenue, although formerly under the control of the lord treasurer and now under that of the lords commissioners of the treasury (*a*), has always been more immediately under the management of the exchequer (*b*), an establishment of very remote antiquity (*c*), consisting of two departments, namely, the receipts department,—for collection of the revenue,—and the judicial department,—for the administration of justice. The exchequer establishment has, however, been re-constituted by divers modern Acts of Parliament, more particularly by the 4 & 5 Will. IV. (1833), c. 15 (*d*), and the Exchequer and Audit Departments Act, 1866 ; and it is now regulated by the Inland Revenue Regulation Act, 1890.

[The revenue of the Crown is either extraordinary or ordinary. The king's *ordinary* revenue is such as has either subsisted time out of mind in the Crown ; or else has been granted by parliament by way of purchase or exchange for such of the king's hereditary revenues as were found inconvenient to the subject.

When we say that the ordinary revenue has subsisted time out of mind in the Crown, we do not intend it to be understood that the Crown is at present in the actual possession of the whole of this revenue, much of it being at this day in the hands of subjects, to whom it has been

(*a*) 4 Inst. 103.
(*b*) 2 Inst. 197.
(*c*) Madox, *Hist. of Exch.*
(*d*) Repealed in 1866 (29 & 30 Vict. cc. 25, 39, 82).

[granted from time to time by the kings of England. We shall consider first the different heads of the ordinary revenue, and then pass to the extraordinary revenue, or revenue from taxation.

The ordinary revenue. — I. The first head of the ordinary revenue is of an ecclesiastical kind, viz. the custody of the temporalities of bishoprics, by which are meant all the lay revenues which belong to the see of an archbishop or bishop. And these, *on the vacancy of the bishopric*, are immediately the right of the king, as a consequence of his prerogative in church matters, whereby he is considered as the founder of all archbishoprics and bishoprics, the person to whom during the vacancy they revert. The Crown takes all the intermediate profits until the appointment of a successor, and that without account; and before the dissolution of the abbeys, the Crown had also, on the death of the abbot or prior, the custody of the temporalities of all such abbeys and priories as were of royal foundation, with the like right to the intermediate profits. And this revenue was esteemed of so high a nature, that it could not, by the common law, have been granted out to a subject, before, or even after, it had accrued; but by the 14 Edw. III. st. 4 (1340), cc. 4 and 5, the king might, after the vacancy, have leased the temporalities to the dean and chapter, saving to himself all adowsons, escheats, and the like. Our antient kings were remarkable for keeping the bishoprics a long time vacant(*e*); and they sometimes, for trifling causes or no cause at all, seized into their own hands the temporalities of bishops, even during their lives. But all such practices have been long discontinued, and as soon as the new bishop is consecrated and confirmed, he usually receives the temporalities entire and untouched from the Crown,

(*e*) An instance of this occurred as late as the reign of Queen Elizabeth, who kept the see of Ely vacant nineteen years, in order to retain the revenues.—Strype, vol. iv. 351.

[at the same time doing homage to the king; and then, and not sooner, he has a fee simple in his bishopric, and may maintain an action for the profits (*f*). This head of the ordinary revenue has, therefore, now ceased to be a calculable item.

II. The next head of the ordinary revenue is also of an ecclesiastical kind, namely, the first fruits and tenths of all spiritual preferments in the kingdom (*g*). These were originally a part of the papal usurpations over the clergy of this kingdom, first introduced by Pandulph, the pope's legate, during the reigns of King John and Henry the Third, in the see of Norwich, and afterwards attempted to be made universal by the Popes Clement the Fifth and John the Twenty-second, about the beginning of the fourteenth century. The first fruits, (*primitiæ* or *annates*,) were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made in the time of Pope Innocent the Fourth, by Walter, Bishop of Norwich, and afterwards advanced in value, by commission of Pope Nicholas the Fourth, under a taxation by the king's precept; which valuation (called that of Pope Nicholas) was begun in 1288, and finished in 1292, and is still preserved in the Exchequer (*h*). The tenths (or *decimæ*) were the tenth part of the annual profit of each living by the same valuation; and this tenth part was also claimed by the Holy See, under the pretence of that precept of the Levitical law, which directs, that the Levites "should

(*f*) Co. Litt. 67, 341.

(*g*) Blackstone notices (vol. i. p. 284), as two other branches of the royal revenue, first, the right of the Crown to a *corody* out of every bishopric, that is, the right to send one of the royal chaplains to be maintained by the bishop, or to have a pension allowed him, till the bishop promotes him to a benefice, which right is in the nature of an incorporeal hereditament; secondly, the right of the Crown to the *tithes arising in extra parochial places*. But the former he apprehends to be fallen into total disuse; and he doubts if either of them is properly to be considered as a part of the royal revenue.

(*h*) 3 Inst. 154.

[" offer the tenth part of their tithes as a heave-offering " to the Lord, and give it to Aaron the high priest " (*i*). But these pretensions of the pope met with a vigorous resistance from the English parliament; and a variety of Acts were passed to prevent and restrain them, particularly the 6 Hen. IV. (1404), c. 1, which calls the payment of first-fruits a horrible mischief and damnable custom. Nevertheless, the popish clergy, blindly devoted to the will of a foreign master, still kept the papal claims on foot; and in the reign of Henry the Eighth, it was computed, that, in the compass of fifty years, 800,000 ducats had been sent to Rome for first-fruits alone. And, as the clergy expressed this willingness to contribute so much of their income to the head of the Church, it was thought proper, when in the same reign the papal power was abolished, and the king was declared the head of the Church of England, to annex this revenue to the Crown. This was accordingly done by the 26 Hen. VIII. (1534), c. 3, whereby it was enacted (ss. 9—11), that commissioners should be appointed in every diocese, to certify the value of every ecclesiastical benefice and preferment, and that according to this valuation the first-fruits and tenths should be collected and paid in future. This valuation of benefices, or *Valor Beneficiorum*, was accordingly made, and is what is commonly called the *King's Books*; and the clergy are at present rated in accordance with it (*j*). But by the 1 Eliz. (1558), c. 4 (s. 5), all vicarages under ten pounds a year, and all rectories under ten marks, were discharged from the payment of first-fruits: and (s. 6) if, in such livings as continued chargeable with the payment, the incumbent lived but half a year, he was to pay only one quarter of his first-fruits; if but one whole year, then half of them; if a year and a half, three quarters; and if two years, then the whole, and not

(*i*) Numb. xviii. 26.

(*j*) This *valor* will be found in Ecton's *Thesaurus*.

[otherwise. By Queen Anne's Bounty Act, 1707 (ss. 5, 6), archbishops and bishops have four years allowed for the payment, and pay one quarter every year, if they live so long upon the bishopric; but other dignitaries of the Church pay on the same principle as rectors and vicars. Also by the 27 Hen. VIII. (1536), c. 8, no tenths are to be paid for the first year, for then the first-fruits are due; and by certain statutes of Queen Anne (6 Anne, cc. 24 and 54) of the years 1706 and 1707, if a benefice be under fifty pounds per annum clear yearly value, it is to be discharged of the payment both of first-fruits and of tenths. The piety of Queen Anne also restored to the Church what had been indirectly taken from it, not indeed by remitting the tenths and first-fruits entirely, but by applying the superfluities of the larger benefices to make up the deficiencies of the smaller; to which end she granted her royal charter, confirmed by the 2 & 3 Anne (1703), c. 11, whereby all the revenue of first-fruits and tenths, under the name of *Queen Anne's Bounty*, is vested in trustees for ever, to form a perpetual fund for the *augmentation of poor livings* (*k*).

III. The next branch of the king's ordinary revenue (which, as well as the subsequent branches, is of a lay or temporal nature,) consists in the rents and profits of the demesne lands of the Crown. These demesne lands, *terræ dominicales regis*, being either the share reserved to the Crown on the original distribution of landed property, or

(*k*) The Acts relating to Queen Anne's Bounty are, besides those referred to in the text, the following, namely: — Queen Anne's Bounty Acts, 1714, 1716, 1803, and 1805, s. 4: Augmentation of Benefices Act, 1831; Queen Anne's Bounty Act, 1838; Parsonages Act, 1838, ss. 3, 4; Pluralities Act, 1838, ss. 72, 119; Church Building Acts, 1838, s. 10, and 1839; Queen Anne's Bounty Act, 1840; Ecclesiastical Commissioners Acts, 1840, s. 76, and 1841, s. 4; New Parishes Act, 1843; Augmentation of Benefices Act, 1854; 23 & 24 Vict. c. 59, s. 7; Parsonages Act, 1865; Queen Anne's Bounty (Superannuation) Act, 1870; Incumbents of Benefices Loans Extension Act, 1881; and Incumbents of Benefices Loans Extension Act, 1896.

[such as came to it afterwards by forfeitures or other means, were antiently very large and extensive, comprising divers manors, honours, and lordships, the tenants of which had very peculiar privileges, as has been shown in a former book of these Commentaries, when we spoke of the tenure in antient desmesne (*l*). At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and particularly, after King William the Third had greatly impoverished the Crown, an Act was passed, by the effect of which, and of subsequent statutes on the same subject, all grants or leases from the Crown of any royal manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments for any longer term than *thirty-one years*, are, in general, declared to be void (*m*), and no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of thirty-one years. Every tenant is, moreover, to be made liable for committing waste; and the usual rent must be reserved, or, where there has usually been no rent, then one-third of the clear yearly value.] In modern times, the care and superintendence of the royal demesnes have been vested in the Commissioners of Woods, Forests, and Land Revenues, a Board of Commissioners which has been separately constituted by the Crown Lands Act, 1851, s. 1 (*n*).

(*l*) *Vide sup.* vol. I. pp. 128, 129.

(*m*) Crown Lands Acts, 1702, 1823, 1829, 1866, 1873, 1885, 1894; Pleading Act, 1711; Crown Private Estate Act, 1800; Pensions Act, 1838, s. 4.

(*n*) The board of "Commissioners of Woods, Forests, Land Revenues, Works and Buildings," was then divided into two boards, the one mentioned in the text, and the other being the "Commissioners of Works and Public Buildings." To this latter board there used to belong (*inter alia*) the management of the royal parks in and near London (see Crown Lands Act, 1851, s. 21: Parks Regulation Act, 1872; *Bailey* v. *Williamson* (1873), L. R. 8 Q. B. 118). But (by the London

To the same branch of the royal revenue properly belong also such rights and interests as the Crown enjoys in the "foreshore." But, by the Crown Lands Act, 1866, ss. 7—15, these have now been transferred to the Board of Trade, in aid of the reduction of the national debt; and compensation out of the consolidated fund is to be made to the Crown for any consequent diminution of its land revenue (*o*).

None of the restrictions above mentioned extend, of course, to the *private* estates of the Crown; that is, speaking generally, to such estates as have been or shall be hereafter purchased or acquired by his Majesty with moneys out of his privy purse, or with other moneys not appropriated to any public service, or which have or shall come to him, his heirs or successors, by gift, devise, or inheritance from any of his or their ancestors, or from any other person or persons, not being kings or queens of this realm (*p*).

IV. [To the ordinary revenue of the Crown might also have been referred (1) the advantages which used to arise from the profits of the military tenures, to which most lands in the kingdom were subject, till the 12 Car. II. (1660) c. 24, in great measure abolished them; and (2) the profitable prerogative of purveyance and pre-emption. The latter was a right enjoyed by the Crown, of buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal household,

Parks and Works Act, 1887), the management of some of these was transferred to the Metropolitan Board of Works, and is now vested in the London County Council as the successors of the Metropolitan Board, under the Local Government Act, 1888.

(*o*) The "foreshore" for the purposes of this Act includes "the shore and bed of the sea, "and of every channel, creek, "bay, estuary, and of every navi- "gable river of the United King- "dom, as far up the same as the "tide flows." (Sect. 7.)

(*p*) Crown Private Estates Acts, 1862 and 1873.

[at an appraised valuation, in preference to all others, and even without consent of the owner; and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor—a prerogative which, during the feudal times, prevailed pretty generally throughout Europe. In those times, the king's household, as well as those of inferior lords, was supported by specific renders of corn and other victuals, from the tenants of the Crown demesnes; and there was also a continual market kept at the palace gate, to furnish viands for the royal use (*q*). These arrangements sufficed so long as the king's court continued in any certain place; but when the court removed from one part of the kingdom to another, as was formerly very frequently done, it was found necessary to send purveyors beforehand, to get together a sufficient quantity of provisions and other necessaries for the household. And then, lest the unusual demand should raise provisions to an exorbitant price, the powers before mentioned were vested in these purveyors, who in process of time very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the Crown. Wherefore, King Charles, at his restoration, consented, by the 12 Car. II. (1660) c. 24, to resign entirely these branches of his revenue and power; and the parliament, in part recompense, settled on him, his heirs and successors for ever, an excise duty on all beer and ale and certain other liquors sold in the kingdom. So that this hereditary excise, the nature of which shall be further explained in a subsequent part of this chapter, at one time formed the fourth branch of his Majesty's ordinary revenue.

V. Another branch of the king's ordinary revenue is usually reckoned to consist in the profits arising from his

(*q*) 4 Inst. 273.

[forests. The nature of forests has been sufficiently explained in a former book of these Commentaries; and what we here refer to are only those profits arising to the sovereign from hence, which consisted principally in amercements or fines levied for a variety of offences against the forest laws in the forest courts (*r*). These have now fallen into abeyance.]

VI. The profits arising from the king's ordinary courts of justice make another branch of his ordinary revenue. These consist not only in fines imposed on offenders, forfeitures of recognizances, and amercements levied upon defaulters (*s*); but also in certain fees due to the Crown in a variety of legal matters. The receipts on the latter account have, however, by the effect of recent improvements in the administration of justice, been considerably reduced, and are also now in great measure prepaid by way of *stamps* affixed to the various documents in use; so that but little, under this head, is at the present time directly returned into the royal exchequer.

VII. We shall class together, as a seventh branch of the sovereign's ordinary revenue, his right to royal fish, and to wrecks, treasure-trove, waifs, and estrays. Our reason for so classing them is, that they are all of the nature of *bona vacantia*, or things found without any apparent owner; and these vest in the Crown, by way of exception from the general rule of law. For, by that general rule, *bona vacantia* are considered as returning, as it were, into the common stock of mankind, and consequently belong, as in a state of nature, to the first occupant or finder; though he is bound, before he appropriates them, to take reasonable pains to discover the former owner, whose right remains, unless they were designedly abandoned by

(*r*) As to forests, *vide sup.* vol. I. pp. 407—411.

(*s*) See the Fines Act, 1833, containing provisions for the more speedy recovery of fines and penalties.

him (*t*). The particular subjects of claim, however, which are above enumerated, and to which may now be added personal property held by trustees for beneficiaries, all of whom have died out (*u*), are all held to vest in the Crown. The true general origin of this peculiarity probably is, (though with respect to some of the objects in this class other reasons are assigned in the books,) that they were formerly of sufficient value, or of sufficiently frequent occurrence, to attract attention, and to be made the subject of particular regulation; while the other cases of finding were, from their insignificance, neglected, and left to the operation of the ordinary rule of law. The regulation which it was thought proper to make, was that of allotting them to the Crown, either to prevent the strife and contention which the mere title of occupancy is apt to create and continue, or else to provide for the support of public authority in a manner the least burdensome to individuals; and in point of fact at least, we find that, while the property in *bona vacantia* generally is vested in the finder, subject to the rights of the original owner, in the particular instances above enumerated it is annexed to the Crown (*x*).

1. [Royal fish. These are whale and sturgeon, which, when either thrown ashore, or caught near the coast, are the property of the king, on account, as it is said in the books, of their superior excellence (*y*). Indeed, our ancestor seems to have entertained a very high notion of the importance of this right, it being the prerogative of the Kings of Denmark and of the Dukes of Normandy;

(*t*) Britt. ch. 17; Finch, 177; *Armory* v. *Delamirie* (1721), 1 Stra. 505; *Merry* v. *Green* (1841), 7 M. & W. 623; *Bridges* v. *Hawkesworth* (1851), 21 L. J. Q. B. 75.

(*u*) *In re Gosman* (1880), 15 Ch. D. 67; *Cunnack* v. *Edwards*, [1896] 2 Ch. 679.

(*x*) Bract. l. 1, ch. 12.

(*y*) Plowd. 315. It is said, in the *Case of Swans* (1592), 7 Rep. 16 a, that a swan is, in like manner, a royal fowl; and that all swans, which have no other known owner, do belong to the king by his prerogative.

[and from one of these it was probably derived to our princes (*z*). It is expressly claimed and allowed in the *De Prærogativâ Regis* (*a*); and the most antient treatises of the law now extant make mention of it, though they seem to have made a distinction between the whale and the sturgeon, the head only of the whale belonging to the king, while the tail belongs to the queen. But the whole of the sturgeon belongs to the king.

2. Shipwrecks are also declared, by the *De Prærogativâ Regis*, to be the king's property; and were so, long before, at the common law. Wreck, by the antient common law, was where any ship was lost at sea, and the goods, or cargo, were thrown upon the land (*b*), in which case, the goods so wrecked, were adjudged to belong to the king; for it was held, that, by the loss of the ship, all property was gone out of the original owner (*c*). But it was ordained by King Henry the First, that, if any person escaped alive out of the ship, it should be no wreck (*d*); and afterwards, King Henry the Second, by his charter (*e*), declared, that if on the coast of either England, Poictou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months, but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This charter was confirmed, with improvements, by King Richard the First; who, in the second year of his reign (*f*), not only established these concessions, by ordaining that

(*z*) Stiern. *de Jure Sueonum*, l. 2, ch. 8; Gr. Coustum. ch. 17.

(*a*) The *Prærogativa Regis* is "an *apocryphal* statute which "may represent the earlier prac- "tice of Edward I." (Pollock and Maitland, *Hist. of Eng. Law*, i. p. 336.)

(*b*) *Sir Henry Constable's Case* (1599), 5 Rep. 106.

(*c*) Dr. & St. d. 2, ch. 51.

(*d*) Spelm. Cod., apud Wilkins, 305.

(*e*) 26th May, 1174; 1 Rymer, *Fœd.* I. 36.

(*f*) Rog. Hoved. in Ric. 1.

[the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet*," but also that, if he perished, his children, or, in default of them, his brethren and sisters, should retain the property, and only in default of brother or sister should the goods remain in the king. And the law, as laid down by Bracton in the reign of Henry the Third, was to this effect, that if only a dog, for instance, escaped, by which the owner might be discovered, nay, if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck (*g*). And this is certainly most agreeable to reason, the claim of the Crown being only founded upon this, that the true owner cannot be ascertained. Afterwards, by the Statute of Westminster the first (1275), c. 4, the law was laid down more agreeably to the charter of Henry the Second; and it was enacted, that if a man, a dog, or a cat, escaped alive, the vessel should not be adjudged a wreck,—these animals being put only for examples (*h*); for not only if any live thing escaped, but if proof could be made of the property of any of the goods or lading which came to shore, they were not forfeited as wreck (*i*). The Statute of Westminster the first further ordained, that the sheriff of the county should be bound to keep the goods a year and a day, (as in France for one year, agreeably to the maritime laws of Oleron (*k*), and in Holland for a year and a half,) so that if any man could prove a property in them, either in his own right or by right of representation, they should be restored to him without delay; but if no such property were proved within that time, they then should be the king's (*l*). And if the goods were of a perishable nature, the sheriff might sell them, and the money was to be

(*g*) Bract. l. 3, ch. 3, s. 5.
(*h*) Flet. l. 1, ch. 44; 2 Inst. 167; 5 Rep. 107.
(*i*) *Hamilton* v. *Davis* (1771), 5 Burr. 2732.
(*k*) Ll. Ol. s. 28.
(*l*) 2 Inst. 168.

[liable in their stead (*m*). This revenue from wrecks was frequently granted out to lords of manors as a royal franchise, but subject, of course, to all the same limitations as wrecks were subject to in the hands of the Crown; also, where any one was thus entitled to wrecks in his own land, and the goods of the king were wrecked thereon, the king might claim them at any time, even after the year and a day (*n*).

It is to be observed, that, in order to constitute a legal *wreck*, the goods must have come to land (*o*). If they continue at sea, the law distinguishes them by the appellations of *jetsam*, *flotsam*, and *ligan*; jetsam being where goods are cast into the sea, and there sink and remain under water; flotsam where they continue floating on the surface of the waves; and ligan where they are sunk in the sea, but tied to a cork or buoy, in order to be found again (*p*). These goods are also the property of the Crown, if no owner appears to claim them; but if any owner appears, he is entitled to recover the possession (*q*). A royal grant of *wreck*, will not, apart from statute, pass things jetsam, flotsam, and ligan (*r*).

Wrecks, in their legal acceptation, are at present not very frequent; for if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And, in order to preserve this property entire for him, our laws, in a spirit quite opposite to those savage laws which formerly prevailed in all the northern regions of Europe,

(*m*) Plowd. 466.

(*n*) 2 Inst. *ubi sup.* Bro. Abr. *Wreck.*

(*o*) *Palmer* v. *Rouse* (1858), 3 H. & N. 505; Hale, *De Jure Maris*, ch. vii.

(*p*) *Constable's Case* (1599), 5 Rep. 106. But see s. 510 of the Merchant Shipping Act, 1894.

(*q*) *Quæ enim res in tempestate levandæ navis causâ ejiciuntur, hæ dominorum permanent,—quia palam est, eas non eo animo ejici quod quis eas habere nolit.* (Inst. 2, 1. 48.)

(*r*) *Constable's Case, ubi supra.*

[have made many humane regulations (*s*).] For, by the common law, if any persons (other than the sheriff) took any goods cast on shore, which were not legal wreck, the owners might have a commission to inquire and compel restitution (*t*) ; and it was provided, by a statute of Edward the Third, that if any ship were lost on the shore, and the goods came to land, they should presently be delivered to the merchants, the latter paying only a reasonable reward, or *salvage*, to those that saved and preserved them. Many additions to the law of wreck and salvage, whereby these subjects were placed on a more satisfactory footing, were, in more modern times, made by the Merchant Shipping Act, 1854, and by the numerous Acts by which that Act was, from time to time, amended (*u*). All these earlier Acts have now been repealed, and their provisions consolidated, by the Merchant Shipping Act, 1894. By this enactment, it is provided, that the Board of Trade shall have the general superintendence of all matters relating to wreck (*x*), which, for the purpose of the Act, includes things jetsam, flotsam, and ligan (*y*), and power is given to such board, with the consent of the treasury, to appoint *receivers of wreck* in different districts. These receivers are authorized to summon as many men

(*s*) On the coasts of the Baltic Sea, in particular, the inhabitants were long permitted to seize on whatever they could get as lawful prize. (Stiern. *de Jure Sueon.* l. 3, ch. 5.)

(*t*) F. N. B. 112.

(*u*) See more particularly Merchant Shipping Act (Amendment) Act, 1855, ss. 19, 20 ; Admiralty Court Act, 1861, s. 9 ; Merchant Shipping Amendment Act, 1862 ; Merchant Shipping Act, 1876, ss. 29—33, appointing *wreck commissioners* to investigate into shipping casualties ; Merchant Shipping (Colonial Inquiries) Act, 1882 ; Merchant Shipping (Expenses) Act, 1882 ; and Merchant Shipping Acts, 1889, c. 43 (tonnage) ; c. 68 (pilotage) ; and c. 73 (colours).

(*x*) As to wreck removed in order to free the navigation, see the Merchant Shipping Act, 1894, ss. 530—534 ; and as to floating derelict, see Derelict Vessels (Report) Act, 1896.

(*y*) The word "wreck" under the Merchant Shipping Act, 1894, s. 510, also includes "derelict" found in or on the shores of the sea or any tidal water (*Cossman* v. *West* (1887), L. R. 13 App. Cas. 160).

as may be necessary, to demand help from any ship near at hand, or to press into their service any neighbouring waggons, carts, or horses, for the purpose of preserving or assisting any stranded or distressed vessel, or her cargo, or for the saving of human life; and a penalty is established in case their demands are not complied with (*z*). The Act contains also copious provisions with reference to salvage for services rendered, and the manner in which the amount is to be assessed in case of dispute; which is either made the subject of an action in the proper division of the High Court of Justice, or, in cases below a certain amount, may be determined by the judge of a neighbouring county court, or before justices of the peace (*a*). With regard to *wreck found*, it is provided, that any finder, other than the owner, must deliver the same, as soon as possible, to the receiver of the district; and, even if such finder be the owner, he must give notice to that officer (*b*). If, before the expiration of a year, no owner establishes his claim to wreck so found, and no person, other than the Crown, is proved to be entitled to the same, it is then to be sold by the receiver. The proceeds thereof, after payment of all expenses and the salvage, if any, were, during the life of the late Queen, paid to the Mercantile Marine Fund created or regulated by the Act (*c*); such moneys are now, for the most part, paid into the Exchequer, and go to form a General Lighthouse Fund (*d*). Other provisions have also been made, with a view to

(*z*) Merchant Shipping Act, 1894, ss. 511—514.

(*a*) *Ibid.* ss. 547—549.

(*b*) *Ibid.* s. 518.

(*c*) Merchant Shipping Act, 1894, s. 525.

(*d*) Merchant Shipping (Mercantile Marine Fund) Act, 1898, s. 1. But such of the proceeds of wreck as shall belong to his Majesty in right of his *duchy of Lancaster*, or as shall belong to the *duchy of Cornwall*, form part of the revenues of such duchies respectively (Merchant Shipping Act, 1894, s. 525). As to salvage within the boundaries of the *cinque ports*, see the Cinque Ports Act, 1821, ss. 1—5, 15, 16 and 18; and the Merchant Shipping Act, 1894, s. 571.

prevent the disgraceful practices of *wrecking* which formerly obtained on some parts of our sea coasts; for, by sect. 515 of the Act of 1894, continuing a like provision in the Act of 1854, if any ship, stranded or in distress on or near the shore, be plundered or damaged by persons riotously and tumultuously assembled together, compensation is to be made to the owner, by the police district, in or nearest to which the offence is committed, in the manner by law provided in cases of the destruction of churches and other buildings by riotous assemblages (*e*). Moreover, by the Larceny Act, 1861, s. 64, persons plundering or stealing wreck are made liable to penal servitude for fourteen years; and, by the Malicious Damage Act, 1861, s. 47, persons exhibiting any false light or signal, with intent to bring a ship into danger, or doing any other malicious act tending to the immediate loss of a ship, may be sentenced to penal servitude for life (*f*).

3. [Treasure-trove (*thesaurus inventus*), is where any money, coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown. The treasure so found belongs to the Crown; but if he that hid it be known, or afterwards found out, the owner, and not the Crown, is entitled to it (*g*). It is the hiding, we may observe, and not the abandonment, that gives the king the property; as appears from Bracton's definition, that it is, in the words of the

(*e*) The provision for compensation for riotous damage to buildings is now contained in the Riot Damages Act, 1886. See also the Malicious Damage Act, 1861, ss. 11, 12.

(*f*) By the civil law, to destroy persons shipwrecked, or to prevent their saving the ship, was punishable with death; and to steal even a plank from a vessel in distress, or wrecked, made the party liable to answer for the whole ship and cargo. (Dig. 47, 9, 3.) In our own law, the provision previously in force on this subject (7 Will. 4 & 1 Vict. (1837), c. 89, s. 5), made this offence of wilfully bringing a ship into danger by false lights, &c., a crime punishable with death.

(*g*) 3 Inst. 132; Dalton, *Sheriffs*, ch. 16.

[civilians, "*vetus depositio pecuniæ*" (*h*). For if a man scatters his treasure into the sea, or upon the surface of the earth, it belongs, not to the Crown but to the first finder (*i*). Formerly indeed, treasure-trove, whether hidden, lost, or abandoned, belonged to the finder; but afterwards it was judged expedient, for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king; and such part was assigned to be all *hidden* treasure, as distinguished from such as was either casually lost or designedly abandoned by the former owner. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius, "*jus commune, et quasi gentium*"; for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark (*j*). The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution, than at present; and the punishment of such as concealed from the king the finding of hidden treasure was formerly no less than death (*k*). Concealment of treasure trove is still a misdemeanor at common law (*l*).

4. Waifs (*bona waviata*) are such goods stolen as are waived, or thrown away, by the thief in his flight, for fear of being apprehended; and these are given by the law to the king, as a punishment upon the owner for not himself pursuing the felon, and taking away his goods from him (*m*). Wherefore, if the party robbed do his diligence immediately to follow and apprehend the thief, (which is called making *fresh suit*,) or do prosecute him to conviction, he shall have his goods again (*n*); also if the party robbed can retake them before they are seized for the Crown, though at the distance of twenty years, the

(*h*) L. 3, ch. 3, s. 4.
(*i*) Bract. l. 3, ch. 3; 3 Inst. 133.
(*j*) *De Jure B. & P.* l. 2, ch. 8, s. 7.
(*k*) Glanv. l. 1, ch. 2; Craig, l. 16, 40; 3 Inst. 133.
(*l*) *R.* v. *Thomas* (1863), Le. & Ca. 313.
(*m*) Cro. Eliz. 694.
(*n*) Finch, L. 212.

[Crown shall not have them (*o*). But if the goods are hid by the thief or left anywhere by him, so that he had them not about him when he fled, and therefore did not throw them away in his flight, they do not in such cases become *bona waviata*, but the owner may have them again when he pleases (*p*) ; and the goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs (*q*).

5. Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them ; in which case the law gives them to the king, or now, most commonly, to the lord of the manor as special grantee from the Crown. But in order to vest an absolute property in the king or his grantees, estrays must be proclaimed in the church, and in the two market towns next adjoining to the place where they are found ; and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his grantee without redemption (*r*), even though the owner be a minor, or under any other legal incapacity (*s*). If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them. The Crown or lord has no absolute property in such animals till the year and day passed ; and so if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again (*t*). Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, all, indeed, which we in general call cattle (*u*) ; but animals *ferœ naturæ*, and not held by the antient law

(*o*) Finch, L. 212.

(*p*) *Constable's Case* (1599), 5 Rep. 109.

(*q*) Fitz. Abr. tit. *Estray*, 1 ; 3 Bulstr. 19.

(*r*) Mirr. ch. 3, s. 19.

(*s*) *Constable's Case, ubi sup.* ; Bro. *Abr. Estray* ; Cro. Eliz. 716.

(*t*) Finch, L. 177. Apparently the estray might be recovered from anyone *taking* it away.

(*u*) Fleta L. 1, ch. 43.

[to be valuable, such as dogs or cats, bears or wolves, cannot be considered as estrays, though swans are said to be an exception to this rule (*x*). He that takes an estray is bound, so long as he keeps it, to find it in provisions, and to preserve it from damage (*y*); and he may not, it is said, use it by way of labour, but is liable to an action for so doing (*z*). But he may milk a cow, or the like; for that tends to the preservation, and is for the benefit of the animal (*a*).

VIII. Another branch of the ordinary revenue is the royal right to mines (*b*), a right which has its original from the king's prerogative of coinage, in order to supply him with materials; and therefore royal mines are only those of silver and gold (*c*). But by the old common law, if gold or silver were found in mines of base material, according to the opinion of some, the whole was a royal mine, and belonged to the king; though others were of the opinion, that it did so only if the quantity of gold or silver was of greater value than the quantity of base metal (*d*).] Now, however, by the 1 W. & M. (1688), c. 30, 5 W. & M. (1693), c. 6, and the Crown Pre-emption of Lead Ore Act, 1815, it has been enacted, that no copper, tin, iron, or lead mines shall be deemed royal mines, whatever quantity of gold or silver may be extracted from them; but that the king, or his grantees, may have the ore on paying for the same a price stated in the Acts. So that private owners are not now discouraged from working mines, through a fear that they may be claimed as royal ones (*e*).

(*x*) *Case of Swans* (1592), 7 Rep. 17 a.

(*y*) 1 Roll. Abr. 879.

(*z*) *Bagshaw* v. *Goward* (1605), Cro. Jac. 147.

(*a*) *Ib.* 148; Noy, 119.

(*b*) As to the coal and other mines in the royal forest of Dean, see the Dean Forest (Mines) Act, 1838; 24 & 25 Vict. (1861), c. 40; Dean Forest (Mines) Act, 1871.

(*c*) 2 Inst. 577; *Att.-Gen.* v. *Morgan*, [1891] 1 Ch. 432.

(*d*) Plowd. 336.

(*e*) *Att.-Gen.* v. *Morgan*, *supra*. As to the tin ore in Devon and

IX. and X. The two remaining branches of the Crown's ordinary revenue are those which arise from escheats and the custody of idiots ; but though in point of order they require here to be enumerated, the mere enumeration will suffice, as they have been both discussed, as far as the plan of the work permits, in former chapters (*f*).

XI. There was, until recently, another branch of the ordinary revenue, namely, the forfeiture of a felon's lands and goods which ensued on conviction. These were called *bona confiscata* by the civilians, because they belonged to the *fiscus* or imperial treasury ; but by our law they are called *bona forisfacta*, that is, such whereof the property is gone away from the owner. By the present law of England, however, no forfeiture of property takes place on the conviction of its owner for felony ; though, perhaps, it may still do so on criminal outlawry or *præmunire*. We need, therefore, now mention only one species of forfeiture, called a *deodand*, which arose from the misfortune rather than from the crime of the owner. [Any personal chattel which was the immediate and accidental occasion of the death of any reasonable creature was called a *deodand*, or thing which should be given to God, as a sort of expiation for the unwitting offence (*g*). Where a thing not in motion was the cause of a man's death, that part only which was the immediate cause was forfeited (*h*) ; but whenever the thing was in motion, not only that part which immediately gave the wound, but all things which moved with it, and helped to make the wound more dangerous, were included in the forfeiture (*i*). It mattered not whether

Cornwall, see the Tin Duties Act, 1838 ; as to tin ore in Cornwall, the Stannaries Act, 1839, s. 1 ; as to lead ore in Durham, 21 & 22 Vict. (1858), c. 58 ; as to mines and minerals, generally, in Cornwall, see 21 & 22 Vict. (1858), c. 109.

(*f*) As to escheats, *vide sup.* bk. ii. pt. i. ch. xii. ; and as to the Crown's custody of idiots, *vide sup.* p. 507.

(*g*) Pollock and Maitland, *Hist. Eng. Law*, ii. p. 473, and the authorities cited in note 3 to that page.

(*h*) 1 Hale, P. C. 422.

(*i*) 1 Hawk. P. C. ch. 26.

[the owner were concerned in the killing or not; for if A. killed B. with the sword of C., the sword was forfeited as an accursed thing (*j*). Hence, in all indictments for homicide, the value of the instrument of death as well as its description used to be found by the grand jury, to enable the Crown or its grantee to claim the deodand. But no thing being a deodand, unless it were presented as such by the jury (*k*), juries very frequently took upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death; and although such finding of the jury may have been hardly warrantable by law, the Court, in general, refused to interfere.] It being, however, obviously better that a law so repugnant to the feelings of mankind should be abandoned, than that the solemn oath under which a juror gives his verdict should be thus evaded, it was enacted by the 9 & 10 Vict. (1846), c. 62, that from the 1st September, 1846, there should be no forfeiture of any chattel in respect of the same having moved to or caused the death of a man.

So far we have spoken of the *ordinary* revenue of the Crown, which, despite recent changes in the law, still stands upon a footing different from that of the *extraordinary* revenue. For although this ordinary revenue is now, by virtue of arrangements made with successive monarchs at their accession (*l*), paid into the national exchequer, and forms part of the Consolidated Fund, yet it differs from the extraordinary revenue in this most important respect, that it is not the result of parliamentary enactment, but the creature of immemorial custom. And although it is at present merged in the national income, as part of the arrangement by which the monarch receives a fixed annual sum for his personal expenditure, instead

(*j*) *Doc. & Stud.* d. 2, ch. 51.

(*k*) 3 Inst. 57; *R.* v. *Browndow* (1839), 11 A. & E. 119; *R.* v. *Polwart* (1841), 1 Q. B. 818.

(*l*) Civil List Acts, 1837 and 1901.

of the casual and uncertain produce of the ancient prerogative rights of the Crown, it should be observed, that the statutes by which this arrangement has been effected are careful to confine it to the lifetime of the king or queen by whom it is sanctioned. In theory, therefore, it would be open to any future monarch at his accession, to insist upon his ancient rights.

We come now to the *Extraordinary Revenue.*—This is the revenue from *taxation*, which at one time was looked upon as a desperate resource, only to be resorted to on occasions of national urgency, but which has now, for at least three centuries, been a regular feature of national economy.

[Contributions by way of taxation, which have been diversely called by the names of aids, subsidies, and supplies, are granted on the request of the Crown, by the Commons of Great Britain and Ireland in Parliament assembled; who, after they have in *committee of supply*, voted a supply to the Crown, and settled the *quantum* of that supply, resolve themselves into what is called a *committee of ways and means*, to consider the ways and means of raising the supply so voted. In this committee, any member may propose such scheme of taxation as he thinks will be least detrimental to the public, though this matter is looked upon as the peculiar province of the Chancellor of the Exchequer, to whom it belongs to bring forward annually his Budget, *i.e.*, his financial statement for the year.]

The following are the chief taxes now imposed by law, namely,—I. The Land-tax; II. The Customs; III. The Excise and Assessed Taxes; IV. The Post-Office Duties; V. The Stamp Duties (including the Death Duties); VI. The Duty on Offices and Pensions; and VII. The Income Tax.

I. [*The Land-Tax.*—This has come in the place of the antient tenths or fifteenths, subsidies, scutages, and tallages, a brief explanation of which shall here be given.

[Tenths and fifteenths were temporary aids issuing out of personal property and granted to the king by parliament (*m*); and they were formerly the real tenth or fifteenth part of all the moveables belonging to the subject, at a time when such moveables were a much less considerable thing than they are at this day. Tenths are said to have been first granted under Henry the Second; but afterwards fifteenths were more usually granted than tenths. Originally, the amount of these taxes was uncertain, as they were levied by assessments newly made at every fresh grant of the commons, a commission for which is preserved by Matthew Paris (*n*); but it was at length reduced to certainty, in the eighth year of Edward the Third (1334), when, by virtue of the king's commission, taxations were made of every township, borough, and city in the kingdom, which were recorded in the exchequer, and such rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 39,000*l*. The name of a fifteenth was still kept up, although, by the increase of personal property, things came to be in a very different situation; and thus when, of later years, the commons granted the king a fifteenth, every parish in England immediately knew its proportion of the tax, for it was the same identical sum that was assessed by the same aid, in the eighth year of Edward the Third. And each parish raised it by a rate among themselves and returned it into the exchequer.

The other antient levies above specified were taxes on the real, and not on the personal, estate, and were in fact in the nature of a land tax. Every tenant of a knight's fee, it will be remembered, was bound, if called upon, to attend the king for forty days in each year (*o*). This personal attendance growing troublesome, the tenants found means of compounding for it, first by sending others in their stead, and in process of time by making a

(*m*) 2 Inst. 77; 4 Inst. 34.
(*n*) A.D. 1232.
(*o*) Vol. i. p. 106.

[*pecuniary* satisfaction to the crown in lieu of it. The pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, under the name of *scutage;* and these were levied for the first time in 1156 (*p*), and confirmed in the fifth year of Henry the Second (1159), on account of his expedition to Toulouse. Such assessments were then mere arbitrary compositions, and were sometimes levied on the landholders by the royal authority only, to the great impoverishment and vexation of the people; wherefore King John was obliged to promise in his Magna Carta (c. 12), that no scutage should be imposed without the consent of the common council of the realm, and in the charters of Henry the Third, it was stipulated, that scutages should be taken only as they were used to be taken in the time of King Henry the Second (*q*). Afterwards, by a variety of statutes under Edward the First and his grandson (*r*), it was provided, that the king should not take any aids or tasks, any tallage or tax, but by the common assent of the great men and commons in parliament. Of the same nature with scutages upon knights' fees were the assessments of *hidage* upon all other lands, and of *tallage* upon cities and burghs (*s*); but they all gradually fell into disuse upon the introduction of *subsidies* about the time of King Richard the Second and King Henry the Fourth.

Subsidies were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4*s.* in the pound for lands, and 2*s.* 8*d.* for goods; and for those of aliens in a double proportion. It was antiently the rule, never to grant more than one subsidy and two fifteenths at a time; but afterwards, as money sank in value, more subsidies were given, as many as twelve subsidies, to be

(*p*) Medley, *English Constitutional History*, 504.

(*q*) 9 Hen. 3 (1225), c. 37.

(*r*) *Confirmatio Cartarum* (1297), cc. 5—7; 34 Edw. 1 (1306), st. 4, c. 1; and 14 Edw. 3 (1340), st. 2, c. 1.

(*s*) Madox, *Hist. Exch.* 480.

[levied in three years, being demanded of the commons in the first parliament of 1640.

The grant of scutages, tallages, or subsidies, by the commons, did not extend to spiritual preferments, the clergy in those days taxing themselves. A subsidy granted by the clergy was according to the valuation of their livings in the king's books; and, at the rate of 4*s.* in the pound, amounted to about 20,000*l.* (*t*). But the last subsidies thus separately given by the clergy were those granted in the 15 Car. II. (1663), since which time, another method of taxation has generally prevailed, which takes in the clergy as well as the laity. In recompense for which, as already mentioned, the clergy have from that period been allowed to vote at the election of members of parliament in respect of their benefices (*u*); and thenceforward the practice of giving ecclesiastical subsidies has fallen into total disuse.

No subsidies were granted either by laity or clergy after the year 1670 (*x*), but periodical assessments of a *specific sum* upon each of the several counties of the kingdom, to be levied by a pound rate on lands and personal estates, were granted as the national emergencies required, according to the method adopted during the Commonwealth. And these periodical assessments, as also the subsidies which had preceded them, and the scutages, hidages, and tallages before mentioned, were to all intents and purposes, so far as they were charged on land, a land-tax, and they were sometimes expressly so called (*y*); although a popular opinion has prevailed, that the land-tax was first introduced in the reign of King William the Third, because, in the year 1692, a new assessment or valuation of estates was then made throughout the king-

(*t*) 4 Inst. 33.

(*u*) Dalt. *Sheriffs*, 334; Gilb. *Hist. of Exch.* ch. 4.

(*x*) The latest were by 22 & 23 Car. 2, c. 3.

(*y*) Com. Journ. 26 June, 9th Dec. 1678.

[dom. It was upon the new valuation so made, that the land-tax was imposed by the 4 W. & M. (1692) c. 1; and the tax has ever since continued a permanent charge upon land (*z*).] By the Land Tax Perpetuation Act, 1798, this tax, which had long been an annual charge, was converted into a perpetual one, and was fixed at four shillings in the pound, a particular sum being charged on each county in accordance with the valuation referred to, and the proportion of each individual being assessed by commissioners appointed by the Crown (*a*). Under the Finance Act, 1896 (*b*), the land-tax is now at a rate not exceeding one shilling in the pound on the annual value; and under the Finance Act, 1898 (*c*), any person whose annual income does not exceed £160 is exempt from the whole, and any person whose income does not exceed £400 is exempt from half, of any land-tax payable by him. The land-tax is subject to redemption by the landowner (*d*); and although the tenant of the land is, by the Land Tax Act, 1797, s. 17, liable to a distress, in the event of the tax remaining in arrear, he is yet, by the same enactment, entitled to deduct the amount which he has paid for it (unless he has expressly agreed to pay all taxes), out of the first sum that shall become due for rent, the tax being, as between landlord and tenant, a charge upon the former, in the absence of any special engagement. Yet if the tenant has, to any extent, a beneficial interest, and does not hold at a rack-rent, he becomes liable *pro tanto*, and can only charge the

(*z*) Under the 4 W. & M. (1692), c. 1, the sum granted was levied on *personal* as well as on landed property; but this was altered by the 3 & 4 Will. 4 (1833), c. 12.

(*a*) Land Tax Commissioners Act, 1827; Land Tax Commissioners (Names) Acts, 1879 and 1893.

(*b*) Sect. 31 (2).

(*c*) Sect. 12.

(*d*) Land Tax Redemption Acts, 1802, s. 180, 1805 and 1817; Land Tax Redemption (Investment) Act, 1853, s. 8; Land Tax Redemption (No. 2) Act, 1853; and Land Tax Commissioners (Names) Act, 1881; Finance Act, 1896, ss. 32, 33; *Kilderbee* v. *Ambrose* (1854), 10 Ex. 454; *Whidborne* v. *Ecclesiastical Commissioners* (1877), 7 Ch. D. 375.

residue on his landlord, the tax being one imposed by the law on the *beneficial proprietor* of the land (*e*).

II. [*The Customs.*—These are the duties, toll, tribute, or tariff payable upon merchandize exported and imported. The considerations upon which this revenue was vested in the king, have been said to be two (*f*): (1) because he gave the subject leave to depart the kingdom, and to carry his goods along with him; and (2) because the king was bound, of common right, to maintain and keep up the ports and havens, and to protect the merchant from pirates. However this may be, the right of the Crown to these customs clearly originated in the grant of parliament (*g*); and by the *Confirmatio Cartarum* (1297), c. 7, the king promises to take no customs from merchants without the common assent of the realm, "saving to us and our heirs "the customs on wool, skins, and leather, *granted before* "*by the commonalty aforesaid.*" On this account these duties on wool, skins, and leather have been called the hereditary customs of the crown, and the said three commodities were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those ports where the king's staple was established, in order to be there first rated and then exported. These duties were also called *custuma antiqua sive magna;* and they were payable by every merchant, as well native as stranger. But there was also another duty, known as the *custuma parva et nova*, which was an impost of ten shillings on the sack of wool, and of threepence in the pound, due from merchant strangers only, for all commodities, as well

(*e*) *Ward* v. *Conet* (1830), 10 B. & C. 635; *Graham* v. *Wade* (1812), 16 East, 29; *Queen* v. *Land Tax Commissioners* (1853), 2 El. & Bl. 694; *Charing Cross Bridge Company* v. *Mitchell* (1855), 4 El. & Bl. 549; *Lord Colchester* v. *Keeney* (1867), L. R. 2 Exch. 253; also Land Tax Redemption Acts 1802 and 1814; Land Tax Act, 1834; Land Tax Redemption Act, 1838; Land Tax Act, 1842; Revenue Act, 1869, Part II.

(*f*) Dyer, 165 b.

(*g*) 2 Inst. 58, 59.

[imported as exported. This was usually called the alien's duty, and was first granted in the thirty-first year of Edward the First (1303) (*h*); but it has long since been abolished.

There is also another very antient hereditary duty, or custom, belonging to the Crown, called the *prisage* or *butlerage* of wines (*i*); the crown being entitled, under the name of this duty, to take two tuns of wine, one before and one behind the mast, from every ship, English or foreign, importing into England twenty tuns or more. But, by a charter of Edward the First, the duty of prisage was exchanged into a duty of two shillings for every tun imported by merchant strangers, and was then called butlerage, because paid to the king's butler (*k*).

Other customs payable upon exports and imports were distinguished into subsidies, tunnage, poundage, and other imposts,—*subsidies* being such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna*; *tunnage* being a duty upon all wines imported, over and above the prisage and butlerage aforesaid; while *poundage* was a duty imposed *ad valorem*, at the rate of twelve pence in the pound, on all other merchandize whatsoever. Other imposts were occasionally laid on by parliament as the circumstances of the time required (*l*). The imposts of tunnage and poundage in particular were first granted for the defence of the realm, and for the intercourse of merchandize safely to come into and pass out of the same (*m*); and were at first usually granted only for a stated term of years, as for two years in the fifth year of Richard the Second (*n*). But in Henry the Sixth's time, and again in Edward the Fourth's time, they were granted

(*h*) 4 Inst. 29.

(*i*) Madox, *Hist. Exch.* 526, 532.

(*k*) Dav. 8; 2 Bulstr. 254; Stat. of Estreats, 16 Edw. 2 (1323); Com. Journ. 27th April, 1689.

(*l*) Dav. 11, 12.

(*m*) 1 Eliz. (1559), c. 20.

(*n*) Dav. 12.

[to the king for life. After that time they were regularly granted for life, sometimes at the first, sometimes at other subsequent parliaments of each reign, till the reign of Charles the First, when, as Lord Clarendon expresses it, his ministers were not sufficiently solicitous for a renewal of the legal grant (*o*). And yet these imposts were thereafter levied and taken unconstitutionally, and without the consent of parliament, for fifteen years together, which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion and murder. For the king, previously to the commencement of hostilities, gave the nation satisfaction for the error which had been committed, when, by the 16 Car. I. (1640), c. 8, he renounced the power of levying these duties without the consent of parliament. Upon the Restoration, these duties were granted to King Charles the Second for life ; and the like grant was made to his two immediate successors. But afterwards, by three several statutes, 9 Anne (1710), c. 11 ; 1 Geo. I. st. 2 (1714), c. 12, and 3 Geo. I. (1717), c. 7), the duties were made perpetual, and mortgaged for the public debt.] Finally, in the year 1787, was passed the Customs Consolidation Act, by which the amount of the duties and the articles on which they should be levied were defined. The law of customs, thus simplified and consolidated, was in the reign of William the Fourth reduced into several statutes repealing all former provisions, and forming a new code upon the subject ; but these statutes were themselves afterwards repealed, and the enactments at present in force will be found chiefly in the Customs Tariff Act, 1876, and the Customs Consolidation Act, 1876, as amended by the statutes mentioned in the note (*p*).

(*o*) *Hist. Reb.* b. 3.

(*p*) The amending statutes are the Customs, Inland Revenue, and Savings Bank Act, 1877 ; Customs and Inland Revenue Acts, 1878, 1879, 1881, 1882, 1883 ; Revenue

III. *The Excise.*—This is directly opposite in its nature to the customs duties; for it is an inland imposition, paid sometimes on the consumption of the commodity, frequently upon the retail sale. Inasmuch as this duty is peculiarly liable to evasion, the officers of the revenue have a power to enter and search the places of business of such as deal in exciseable commodities, at any hour of the day, and, in the presence of a constable, of the night also; and excise offences are summarily dealt with, either before the commissioners of revenue or before justices of the peace, subject, in either case, to an appeal.

The excise was originally established, by an Ordinance of the Long Parliament, in 1643, with the intention that it should continue only till the end of the civil war. At first it was laid only on beer, ale, cider, and perry (*q*); but it was soon afterwards imposed on wine, tobacco, sugar, and a great multitude of other commodities (*r*). Upon King Charles' Restoration, it having then been long established, and its produce well known, some part of it was given to the Crown, by way of purchase (as was before mentioned) for the feudal tenures and other oppressive parts of the hereditary revenue. Since that period it has constantly formed part of the taxes of the nation, being, however, now limited to beer, spirits, chicory, and coffee. Under recent Acts of Parliament, many imposts, which are not properly in the nature of excise, have been classed, for greater convenience in collection, under this head of duties, *e.g.*,

Acts, 1883, 1884; Customs and Inland Revenue Acts, 1885, 1886; Customs Amendment Act, 1886; Customs and Inland Revenue Acts, 1887, 1888, 1889; Revenue Act, 1889; Customs and Inland Revenue Act, 1890; Customs Consolidation Act, 1876, Amendment Act, 1890; Finance Acts, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902; Revenue Act, 1898; and (as to the Isle of Man) the Isle of Man (Customs) Acts, 1898, 1900, and 1901; Exportation of Arms Act, 1900.

(*q*) Com. Journ. 17th May, 1643.

(*r*) *Ibid.* 27th May, 1643.

dog-licences (*s*), gun-licences (*t*), and game-licences (*u*), the licences of appraisers and house-agents, pawnbrokers, hawkers, pedlars, and the like. To this branch of the revenue there have also been assigned the duties on stage and hackney carriages, on railway passengers, on race-horses, and on wine licences and refreshment houses (*v*); also, all the duties which used to be known by the name of the *assessed taxes*, these last being duties assessed and charged upon persons in respect of the houses they inhabit, and of certain articles by them used or kept (*x*). Such assessed taxes comprise also the duties on male servants, on private carriages, and on armorial bearings (*y*). The collection of all these taxes is now regulated by the Taxes Management Act, 1880; and anyone liable to pay, who fails to pay them, may, in default of a sufficient distress to answer them, be committed to prison until payment, upon an order to that effect of two of the Inland Revenue Commissioners (*z*).

IV. [Another source of the revenue is the *Post Office*. This, like the excise, was first established in 1643, having been invented or organised by Prideaux, attorney-general to the commonwealth, who was appointed postmaster-general (*a*). When the common council of London endeavoured to erect an opposition post office, the House of Commons declared that the office of postmaster is and ought to be in the sole power and disposal of parliament (*b*); and in 1656 a regular post office was erected,

(*s*) Dog Licences Act, 1867; Customs and Inland Revenue Act, 1878, s. 17.

(*t*) Gun Licence Act, 1870.

(*u*) Game Act, 1831; Game Licences Act, 1860.

(*v*) Refreshment Houses Act, 1860.

(*x*) Revenue Act, 1869, s. 18.

(*y*) Revenue Act, 1869, Part V.; Customs and Inland Revenue Act, 1888, s. 4.

(*z*) Revenue Act, 1869, s. 30; Taxes Management Act, 1880, ss. 86—91.

(*a*) Com. Journ. 7th Sept. 1644; 21st Mar. 1649.

(*b*) *Ibid.*

[by the authority of the Protector and his parliament, on nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign of Queen Anne (*c*).] But the rates have been, of course, since altered, and many further regulations added, by many subsequent statutes (*d*); and, by the Post Office Act, 1875, s. 6, the duties authorised by the Post Office Acts are declared to be stamp duties, and are placed under the management of the Commissioners of Inland Revenue.

[Probably, no more eligible method of raising money upon the subject can be devised than this Post Office tax; and the system has been, in recent years, very largely and diversely extended. Thus, in the year 1840, by the Post Office (Duties) Act, of that year, the privilege formerly exercised by all members of parliament, of *franking* (or sending and receiving letters free of duty) was wholly abolished. Since that year the postage has been gradually reduced to an uniform rate, irrespective of distance, which amounts at present, to the sum of only one penny for every letter conveyed between places in the United Kingdom, provided it does not exceed four ounces in weight; the rate to India and some colonies is one penny the half-ounce, and foreign letters and letters to some colonies are carried at the rate of twopence halfpenny for every half ounce. In further development of the system, *books*, *newspapers*, and other *postal packets* are now also carried, at low rates of postage in proportion to the weight con-

(*c*) See the Act in Scobell, 511.

(*d*) Post Office (Management) Acts, 1837 to 1884; Post Office (Offences) Act, 1837; Railways (Conveyance of Mails) Act, 1838; Post Office Duties Acts, 1840 to 1891; Post Office (Money Orders) Acts, 1848 to 1883; Post Office Acts, 1837 to 1897; Post Office (Sites) Act, 1885; and Conveyance of Mails Act, 1893 (*Mails on Tramways*). As to the Isle of Man and Channel Islands, see Post Office Act, 1892.

[veyed; and since the year 1875, *post cards* (*i.e.*, open letters) have come into use, bearing a halfpenny stamp only (*e*). The produce arising from this branch of the revenue is steadily increasing.

The machinery of the Post Office is also now used for the management of that class of savings bank which is called the Post Office Savings Bank, for the issuing of money orders and of postal orders (*f*), for the granting of small life insurances and life annuities (*g*), and for the conveyance of small parcels by parcel post (*h*). For a considerable number of years, the Post Office has also had the direction of the electric telegraphs of the kingdom (*i*). Special postal and telegraph facilities for outlying places are also now provided (*k*), and specific provisions have been made for the punishment of offences relating to the Post Office in its various departments and branches (*l*).

V. A fifth branch of the revenue (also under the management of the commissioners of inland revenue) consists in the *Stamp Duty*, which is a tax imposed upon a great variety of legal and other documents (*m*), and, in fact, on almost all instruments between man and man

(*e*) Post Office Act, 1875, s. 1; and (as to reply post cards) see the Post Office (Reply Post Cards) Act, 1882.

(*f*) Post Office (Money Orders) Acts, 1848 to 1883.

(*g*) Government Annuities Act, 1882.

(*h*) Post Office (Parcels) Act, 1882.

(*i*) The Telegraph Acts, 1863 to 1899, include Acts of the following years, viz.: — 1863, 1866, 1868, 1869, 1870, 1878, 1885, 1889, 1892, 1897, and 1899. It was by the Act of 1885 that the minimum rate for inland telegrams was reduced to sixpence.

(*k*) Post Office Act, 1891, s. 8; Post Office Amendment Act, 1895; Post Office and Telegraph Act, 1897; and the Post Office (Guarantee) Acts, 1898.

(*l*) Post Office (Protection) Act, 1884.

(*m*) See the Common Law Courts (Fees) Act, 1865; as to *court fees*, the Judicature Act, 1875, s. 26; as to *fines and fees* to local authorities, the Local Stamp Act, 1869; and as to fees to public

[which are written on parchment or paper; and also upon cards and dice (*n*). The first institution of the stamp duties was by the 5 & 6 W. & M. (1694), c. 21; but they have long since been increased vastly beyond the original design (*o*).] There are also now three specific duties on property, commonly called the *Death Duties*, classed under this branch of the revenue, which are of such importance as to deserve a particular mention, viz., the duty payable under the Legacy Duty Acts (*p*); the duty payable under the Succession Duty Act, 1853 (*q*); and the temporary Estate Duty payable under the Customs and Inland Revenue Act, 1889 (*r*), or (in the case of deaths after the 1st August, 1894) under the Finance Act, 1894, as amended by the Finance Acts, 1896, 1898, and 1900.

officers generally, the Public Offices Fees Act, 1879.

(*n*) Revenue Act, 1862, ss. 27—37.

(*o*) The principal Stamp Acts are the Stamp Acts, 1815 and 1891, which latter consolidates the law and repeals the Stamp Act, 1870, and many other Acts relating to stamp duties, and has been amended by the Revenue Act, 1898, the Stamp Duties Management Act, 1891, the Customs and Inland Revenue Act, 1893, ss. 3, 4, and the Finance Act, 1894, ss. 39, 40, and the Finance Acts of 1895 to 1902. See also the following statutes containing enactments on this subject: Demise of the Crown Act, 1830; London Hackney Carriage Act, 1831; Stage Carriages Act, 1832; Oxford University Act, 1855; Cambridge University Act, 1858; Revenue, Act, 1867, ss. 20—24; Revenue, Friendly Societies, and National Debt Act, 1882, Part II.; and Customs and Inland Revenue Act, 1885, Part II.

(*p*) See the Legacy Duty Acts, 1796 and 1805; Stamp Act, 1815, sched; Revenue Act, 1845, s. 4.

(*q*) Amended by the Customs and Inland Revenue Acts, 1888, s. 21, and 1889, ss. 10—15 See *Att.-Gen.* v. *Hallett* (1857), 2 H. & N. 368; *Att.-Gen.* v. *Baker* (1859), 4 H. & N. 19; *Att.-Gen.* v. *Upton* (1866), L. R. 1 Exch. 224; *Att.-Gen.* v. *Mitchell* (1881), 6 Q. B. D. 548; and *Re Warner* (1881), 17 Ch. D. 711.

(*r*) Sects. 5—9. By the Customs and Inland Revenue Act, 1885, Part II., the property of bodies corporate and unincorporate, theretofore exempt, have been subjected to succession duty at the rate of 5*l.* per cent. upon their net profits or income; but there are still some exceptions to this liability,

The nature of the two latter duties has, however, previously been explained (*s*).

Legacy Duty.—This duty is chargeable in respect of personal estate on all legacies and shares of residue, except that husbands and wives are exempt from the duty in respect of sums coming from each other. The duty payable by a child of the deceased, or by the descendant of such child, or by the father or mother or any lineal ancestor of the deceased, used to be 1*l.* per cent. But when the probate and account duty payable on obtaining probate or letters of administration under the Customs and Inland Revenue Act, 1881, s. 27, had been paid, this duty of 1*l.* was not also payable (sect. 41); and now where the Finance Act, 1894, is applicable, if the estate duty appointed by that Act has been paid, the duty of 1*l.* per cent. is not to be paid (sect. 1). The duty payable by a brother or sister of the deceased is 3*l.* per cent.; by a brother or sister of the father or mother of the deceased, or by their descendants, 5*l.* per cent.; by a brother or sister of the grandfather or grandmother of the deceased, or by their descendants, 6*l.* per cent.; and by any more distant relation or by a stranger, 10*l.* per cent. All these last-mentioned duties still remain payable, in addition to the estate duty just mentioned.

VI. The last branch of the revenue to be here noticed, is the duty which is charged upon *Offices of Profit and Pensions* payable by the Crown, exceeding the value of 100*l.* per annum, a duty which was first imposed in the reign of George the Second (*t*); and, after having been from time to time continued, was made perpetual by the Duties on Offices and Pensions Act, 1836 (*u*).

e.g., the Crown, charities, and the like. (See the *Case of the Incorporated Council of Law Reporting* (1889), 22 Q. B. D. 279.)

(*s*) See *ante*, bk. ii., pt. i., ch. xxvi.

(*t*) Pension Duties Act, 1757.

(*u*) See Customs and Inland Revenue Amendment Act, 1877.

VII. The taxes of which notice has now been taken are those which are permanently fixed upon the subjects of this realm; but in the year 1842, the revenue being insufficient to meet the public expenditure, it was thought proper to revive, with some modifications, a tax of which there are traces in the first half of the fifteenth century, but which after that time fell into disuse till again resorted to by Pitt in 1799. This—the Income Tax—was, however, dropped in 1802, revived in 1803, and again abolished in 1816. Finally, by the Income Tax Act, 1842, this tax was re-imposed on the yearly profits arising from property, professions, trades, and offices; and by frequent renewals up to the present time, its existence has been prolonged, though the rate in the pound has been the subject of variation in the successive Acts, now become annual, by which the tax itself has been continued (*x*). The basis on which, and mode in which, it is to be assessed, both generally and in particular cases, are defined in the Acts (*y*).

All of the above taxes were levied to discharge the

(*x*) The two chief Income Tax Acts are those of 1842 and 1853, which contain the general rules for levying and assessing the tax. See for the chief amending Acts, both as to incidence, exemptions, management, and rates, Income Tax (Insurance) Acts, 1853 and 1855; Income Tax Act, 1854; Income Tax Acts, 1859 and 1860; Revenue (No. 2) Act, 1861, ss. 36, 37, 38, 45, 46; Revenue (No. 1) Act, 1864, s. 15; Revenue Acts, 1866 and 1868; Customs and Inland Revenue Acts, 1876, s. 8, and 1878, Part II.; Taxes Management Act, 1880; Customs and Inland Revenue Acts, 1885, Part III.; 1887, Part III.; and 1888, Part V.; Revenue Act, 1889, Part II.; Customs and Inland Revenue Act, 1890, Part IV.; Trade Union (Provident Funds) Act, 1893; Customs and Inland Revenue Act, 1893, s. 7; Finance Acts, 1894, Part IV.; 1896, Part V.; 1897, s. 5; 1898, ss. 8—10; and 1902, s. 10; and the subsequent annual Finance Acts. As to the remuneration paid to the *Collectors of Income Tax*, see Income Tax (Public Offices) Act, 1872; Taxes (Regulation of Remuneration) Acts, 1891 and 1892; Dowell, *Income Tax Laws*, 1902.

(*y*) *Coltness Iron Company* v. *Black* (1881), 6 App. Ca. 315; *Mersey Docks* v. *Lucas* (1883), 8 App. Ca. 891; *Last* v. *London Assurance Corporation* (1885), 10 App. Ca. 438; *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531.

expenses annually incurred by the government, in respect of the public services, including therein the maintenance of the royal dignity ; and a very large proportion of these expenses consist in payments made on account of the interest of the *National Debt*, a subject of which it is proper therefore to take some notice in this place.

The national debt is in part *funded* and in part *unfunded*: the former being that which is secured to the national creditor upon the public funds (the nature of which will be presently explained), and the latter, that which is not so provided for. The unfunded debt is ordinarily but of small amount, and is secured by *treasury bills*, which are instruments issued by the Bank of England under warrant from the Treasury, in accordance with Acts of Parliament passed for the purpose ; they are issued for three, six, nine, or twelve months, and are put up to tender, and sold at a discount, and thus do not carry interest (*z*). But of the funded debt, a more particular account must here be attempted.

[In order to a proper view of this part of the national debt, it must be borne in mind, that, after the Revolution, when our new connexions with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars on the continent for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the House of Austria, maintaining the liberties of the Germanic body, and other kindred purposes, increased to such an unusual degree, that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create

(z) Treasury bills issued under the authority of Parliament are charged upon and paid out of the *consolidated fund* ; as to them, see the Exchequer and Treasury Bills Acts, 1866 and 1877, the National Debt Act, 1889, s. 5, and the Bank Act, 1892, ss. 3, 4 ; and H. of C. Paper 187 of 1889. (Treasury bills have taken the place of *exchequer* bills, which, after an existence of 200 years, ceased to be issued in 1861, and were finally paid off in in 1896-7.)

[murmurs among the people. It was therefore the policy of those times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the State, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed, by this means converting the principal debt into a new species of property, transferable from one man to another at any time and in any quantity.] This policy of the English parliament was the first commencement of what is called the national debt. The debt has since been largely increased owing to divers successive emergencies: and, notwithstanding certain provisions for its gradual reduction, it amounted, on the 31st March, 1903, to 640,085,726*l.*, independently of the outstanding unfunded debt to the extent of 75,133,000*l.* more (*a*).

The form of the security held by the public creditors, in respect of the funded debt, is that of annuities granted by parliament to those who originally advanced the money, and granted for the most part in perpetuity, affording a certain rate of interest for ever upon the principal sum due. These annuities are called the *public funds*, and they are transferable by the holder, and pass by law to his representatives; being subject, in every material particular, to all the incidents ordinarily attaching to other personal property (*b*). The annuitants have no right to call for the payment of the principal of the debt (*i.e.*, to have their annuities redeemed), although the government has always the right of redemption; and this right on the part of the government has been exercised to a very considerable extent under the provisions of the National

(*a*) This does not include the value in stock of terminable annuities, of which (at the same date) the estimated capital value was 55,560,036*l.*, nor other capital liabilities (not charged directly on the consolidated fund) amounting to 27,570,428*l.* See the Finance Accounts for the year ending 31st March, 1903. (Cd. 1581.)

(*b*) In the National Debt Act, 1870, there are a variety of enactments relating to the national debt, having reference chiefly to the payment of dividends, and to unclaimed dividends, and to the issue to stockholders of stock certificates with coupons annexed made payable to *bearer*.

Debt (Conversion) Act, 1888 (*c*), whereby the stock theretofore called the New Three per Cents. has been converted into a new stock to be called 2¾ per Cent. Consolidated Stock till the 5th April, 1903, and to be called 2½ per Cent. Consolidated Stock after that date. And in the same Act, as supplemented by the National Debt Redemption Act, 1889 (*d*), are contained provisions for the compulsory redemption of all existing Consolidated Three per Cent. Stock and Reduced Three per Cent. Stock, and for the corresponding increase of the new stocks created under the National Debt (Conversion) Act, 1888, just referred to. And by the National Debt Redemption Act, 1893, the like provision was made for the redemption after the 5th January, 1894, of the New Three Pounds Ten Shillings per Cent. Annuities referred to in the Act, which were made redeemable after that date by the National Debt Act, 1870.

The national debt is, doubtless, a heavy burden upon the state ; and if England were a poor country, it would be an intolerable burden. But it is nevertheless, according to some economists, a great benefit to the whole nation, affording, as it does, a ready, safe, and easily convertible species of investment for the immense capital which would otherwise either lie unproductive, or be laid out in securities of a troublesome and hazardous nature. It conduces also, in a very sensible degree, to the stability of the national institutions, and to the preservation of the public welfare ; so that, unless England should become an impoverished country, the arrangements made for the ultimate permanent reduction of the principal of the debt by means of a *sinking fund* (*e*), are not of much practical

(*c*) Amended by the National Debt (Supplemental) Act, 1888.

(*d*) And see the National Debt Act, 1889.

(*e*) A sinking fund was first established in 1716 by the Act of 3 Geo. 1, c. 7, and one was again set up by Pitt in 1786. The present sinking fund, known as the *New Sinking Fund*, depends on the Sinking Fund Act, 1875.

value. The New Sinking Fund has been suspended on several occasions, *e.g.*, in 1886 (*f*), in 1897 (*g*), and during the late war (*h*); the Finance Bill for 1903 proposes to fix the annual charge for the National Debt at £27,000,000.

[The respective produces of the several taxes before mentioned, were originally distinct funds, being securities for the sums advanced thereon, and for them only. But these distinct funds have been more or less aggregated; and as the result of such aggregation, there were formerly three capital funds in existence, namely, (1) the *aggregate* fund, (2) the *general* fund, and (3) the *South Sea* fund.] But in the year 1787 the public accounts were again newly arranged, by abolishing these divisions and including the whole in one, called the *Consolidated Fund* (*i*), which fund was still later combined with that of Ireland, and now forms with it the *Consolidated Fund of the United Kingdom* (*k*).

The net receipts of income paid into the exchequer in the financial year ending 31st March, 1903 (after deducting repayments, &c.), amounted to 161,200,000*l.* (*l*); and that income, under the name of the consolidated fund, is pledged for the payment of the whole of the interest of the national debt of Great Britain and Ireland (*m*), the yearly income being liable for the yearly interest. In addition, the consolidated fund is liable to several other specific charges imposed upon it at various periods by Act of Parliament, such as the *Civil List* and the salaries of ambassadors, the salaries and pensions of the judges (including county court judges (*n*)), and the salaries of

(*f*) National Debt Act, 1886.

(*g*) Military Works Act, 1897, s. 3.

(*h*) Finance Acts, 1900 and 1901.

(*i*) Consolidated Fund Act, 1787

(*k*) See Consolidated Fund Act, 1816; Revenue (Transfer of Charges) Act, 1856.

(*l*) This amount includes the sum of 9,648,000*l.* paid to local taxation accounts. H. of C. Paper 119 of 1903.

(*m*) Consolidated Fund Act, 1816.

(*n*) County Courts Act, 1888, ss. 23, 24.

certain other official persons (*o*); after payment of all which, the surplus is to be indiscriminately applied to the service of the United Kingdom under the direction of parliament (*p*). And, in order to bring the national income and expenditure under the more immediate view and control of parliament, certain payments and salaries formerly charged on the consolidated fund were in 1854 directed, for the future, to be paid out of supplies from time to time provided, and annually appropriated by parliament for the purpose.

The Civil List above mentioned is an annual sum granted by parliament at the commencement of each reign, for the expense of the royal household and establishment, as distinguished from the general exigencies of the State; and is the provision before stated to be made for the crown out of the taxes, in lieu of the crown's proper patrimony, and in consideration of the assignment of that patrimony to the public use. It must be pointed out that, though there has been a Civil List so called since the Revolution, the king was originally required to provide out of the income so assigned to him practically all the expenses of the civil government; it is only since the reign of William IV. that the Civil List has been freed from all *public* charges, and come to mean the income granted for the personal expenses of the monarch. The amount fixed for the Civil List has been subject in different reigns to considerable variation. At the commencement of the

(*o*) See also, as to "superannuation allowances" or "retiring pensions," the following Acts:—as to prison officials, Prison Act, 1877, ss. 36, 53; Prison (Officers' Superannuation) Acts, 1878 and 1886; and as to the police, Police Superannuation Act, 1865; Police Acts, 1890 and 1893; and as to subordinate officials generally, Superannuation Acts, 1834, 1859, 1860, 1876, 1887, and 1892. See also Ecclesiastical Commissioners (Superannuation) Act, 1865; Colonial Governors (Pensions) Act, 1865; Superannuation Act, 1866; Political Offices Pension Act, 1869; Pensions Commutation Act, 1871; Metropolitan Police Staff (Superannuation) Act, 1875.

(*p*) Public Revenue and Consolidated Fund Charges Act, 1854.

present reign, a Civil List was granted to, and settled on, his Majesty for life, to the amount of 470,000*l.* per annum, payable quarterly out of the Consolidated Fund; of which sum, 110,000*l.* is assigned for their Majesties' privy purse, and the remainder is applicable chiefly to the salaries and expenses connected with their household (*q*). As above noticed, Civil List pensions are no longer chargeable on the Civil List. In return for that grant, it was at the same time provided, that the hereditary revenues of the Crown should, during the present reign, be carried to, and form part of, the Consolidated Fund (*r*). The Civil List, therefore, now stands in the same place as the hereditary income did formerly, but with this great difference, namely, that it is not chargeable, as the hereditary income was, with the general and public expenses of the government. [The whole revenue of Queen Elizabeth amounted to 600,000*l.* a year (*s*); that of King Charles the First was 800,000*l.* (*t*); and the revenue voted for King Charles the Second was 1,200,000*l.* (*u*). But under these sums were included all manner of public expenses; and Lord Clarendon computed, that the charge of the navy and land forces alone amounted annually, soon after the Restoration, to 800,000*l.* (*x*). The same revenue, subject to the same charges, was settled on King James the Second (*y*); but, through the increase of trade and by more frugal management, it amounted on an average to a million and a half per annum, (besides other additional customs granted by parliament, which produced an annual revenue of 400,000*l.* (*z*),) out of which his fleet and army were maintained at a yearly expense of 1,100,000*l.* (*a*).]

(*q*) The Act for this purpose is the Civil List Act, 1901.
(*r*) Civil List Act, 1901.
(*s*) Lord Clar. *Continuation*, 163.
(*t*) Com. Journ. 4th Sept. 1660.
(*u*) *Ibid.* 13th Sept. 1660.
(*x*) Lord Clar. *Continuation*, 165.
(*y*) 1 Jac. 2 (1685), c. 1.
(*z*) Caps, 3, 4.
(*a*) Com. Journ. 1st March and 20th March, 1688.

Upon the whole, it is doubtless much better for the Crown, and also for the people, to have the revenue settled on the modern rather than on the antient footing. For the Crown, because it is more certain, and collected with greater ease; and for the people, because they are now delivered from the feudal hardships, and other odious branches of the prerogative.

CHAPER VIII.

OF THE ROYAL FORCES.

WE now come to consider the royal forces, and the manner in which these forces are raised and maintained; and we shall make some preliminary remarks on the history of the army and navy.

[In the time of our Saxon ancestors, as appears from Edward the Confessor's laws (*a*), the military force of this kingdom was in the hands of the dukes, or heretochs, who were constituted through every province and county in the kingdom; and as they were invested with unlimited power, therefore they were elected by the people in their full assembly, or folkmote, in accordance with the fundamental maxim of the Saxon constitution, that where any officer was entrusted with unlimited power, that power should be delegated to him by the vote of the people themselves (*b*).

It seems to be universally agreed, that King Alfred first settled a national militia in this kingdom, but he possibly left too large a power in the hands of the dukes or heretochs, whereby he enabled Duke Harold, on the death of Edward the Confessor, to mount the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir. At the Norman conquest, when the feudal system was developed (which system was essentially military), all the land in

(*a*) Schmidt, *Gesetze der Angelsachsen*, c. 32*a*. [The meaning of the passage is very doubtful, and, in any case, it is poor evidence of Anglo-Saxon usage. E.J.]

(*b*) "*Isti vero veri eligebantur per commune consilium, pro communi utilitate regni, per provincias et patrias universas, et per singulos comitatus, in pleno folkmote, sicut et viceconites, provinciarum et comitatuum, eligi debent.*" — Ll. Edw. Confess. *ubi sup.* See also Bede, *Eccl. Hist.* l. 5, ch. 10.

[the kingdom, held by tenure in chivalry, was divided into what were called knights' fees, of which the traditional number was sixty thousand, though modern investigation suggests five thousand as a more probable number (*c*). For every knight's fee, a knight or soldier (*miles*) was bound (as we have said) to attend the king in his wars for forty days in the year ; and by these means, the king had, without any expense, a fighting force always ready at his command. In addition, the Assize of Arms (27 Hen. II.) (1181), and afterwards the Statute of Winchester, under Edward the First (1285), obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace. By the latter statute, constables were appointed in all hundreds to see that such arms were provided ; and by the 4 & 5 Ph. & M. (1558), c. 2, these weapons were changed into others of more modern service. While these provisions continued in force (that is, until the reign of James the First, when they were repealed), it was usual from time to time for our princes to issue commissions of of array, and to send into every county officers in whom they could confide, to muster and array (or set in military order) the inhabitants of every district. But in the fourth year of Henry the Fourth (1402), it was provided, that no man should be compelled to go out of the kingdom at any rate, nor out of his shire, unless in cases of urgent necessity ; nor to provide soldiers, unless by consent of parliament (*d*). About the reign of King Henry the Eighth, however, *lieutenants* of counties began to be introduced, as standing representatives of the Crown, in military matters (*e*), Camden describing them (*f*), in the time of Queen Elizabeth, as extraordinary magistrates constituted in times of difficulty and danger. These commissions of

(*c*) Maitland, *Domesday Book*, p. 511.

(*d*) For the earlier laws, see 1327 and 1352.

(*e*) 15 Rym. 75 ; and see 4 & 5 Ph. & M. (1558), c. 3.

(*f*) *Brit.* 103, edit. 1594.

[lieutenancy gradually superseded the old commissions of array; and King Charles the First having, during his northern expedition, issued these commissions of lieutenancy, it was made a question with the Long Parliament, how far the power of the militia did inherently reside in the king. Eventually, the parliament denied this prerogative of the Crown, and also seized into their own hands the entire power of the militia.

At the restoration of King Charles the Second, however, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the Crown to govern and command them, and to put the whole upon a more regular military footing;] and the legal position of the militia, at the present day, is principally built upon the statutes which were then enacted—viz., the 13 Car. II. (1661), st. 1, c. 6, which declared that the supreme command of all the militia of the realm is, and ever was, the undoubted right of the king (*g*), the 14 Car. II. (1662), c. 3, and the 15 Car. II. (1663), c. 4. It is true that these statutes have been in part repealed (*h*); but, by the subsequent Militia Acts, many of their provisions are re-enacted, with the addition of new regulations. The present system is chiefly governed by the provisions of the general Militia Act, 1802, and the Militia Act, 1882, which latter statute repealed and re-enacted with amendments the Militia (Voluntary Enlistment) Act, 1875, and has been itself amended by the Reserve Forces and Militia Act, 1898, and the Militia and Yeomanry Acts, 1901 and 1902. The scheme of the present system is to train, at stated periods of the year, for the internal defence of the country, a certain number of the inhabitants of every county, who are enlisted for a period not exceeding six years, and officered by gentlemen commissioned by the Crown for that purpose. Although thus periodically called together for the purpose of being trained,

(*g*) See the Regulation of the Forces Act, 1871, Part II.

(*h*) Statute Law Revision Act, 1863.

the militia, save so far as has been otherwise provided by the Reserve Forces and Militia Act, 1898, s. 2, can only be *drawn out and embodied* in case of imminent national danger or great emergency; the occasion being first communicated to parliament, if sitting, or, if not sitting, proclaimed by order in council (*i*). At present the militia is raised by voluntary enlistment under the Militia Act, 1882; and the compulsory levy by way of ballot remains suspended under the Militia (Ballot Suspension) Act, 1865 (*k*), but may be at any time revived by Order in Council. The men are entitled to pay, while on service and during the period of training.

Besides the *militia*, we are to take into account our unpaid yeomanry and volunteer forces. These in their present form, originated under fears of a French invasion in 1859, the volunteers which were called into existence by the Napoleonic wars (*l*), having been disbanded in 1815. By means of such volunteers, the defensive military force of the country has been immensely increased; and the necessity for maintaining this voluntary army appears to be now universally acknowledged, in consequence of the very large and constant additions made to the armaments of the continental powers (*m*).

[The occasions of war, however, require soldiers more completely and perfectly disciplined than those of the militia or volunteers; our military establishment consequently comprises, besides these, a large body of *regular* forces who are raised by voluntary enlistment. Our constitution indeed looks with jealousy upon levies of this

(*i*) Militia Act, 1882, s. 18. See further as to the militia, the Reserve Forces and Militia Act, 1898, and Militia and Yeomanry Acts, 1901 and 1902.

(*k*) Expiring Laws Continuance Act, 1902.

(*l*) Yeomanry Act, 1804, since repealed, so far as relates to volunteer infantry in England, by the Volunteer Act, 1863.

(*m*) By the Volunteer Act, 1863, amended by the Volunteer Acts, 1869, 1895, 1897, and 1900, the previous Acts relating to the volunteer force in Great Britain were consolidated, with amendments.

[description ; and King Charles the Second having, after the Restoration, kept up by his own authority, for guards and garrisons, about five thousand regular troops (which King James the Second by degrees increased to no less than thirty thousand, all paid from his own Civil List), it was made one of the articles of the Bill of Rights (1689), that the raising or keeping a standing army within the kingdom in time of peace, unless with the consent of parliament, is against law. But, as the fashion of keeping standing armies, first introduced by Charles the Seventh of France, in the year 1445 (*n*), came afterwards to prevail universally over Europe, it has also for a long time been judged necessary by our legislature, for the safety of the kingdom, the defence of the realm, and the preservation of the balance of power in Europe, to maintain, even in time of peace, a standing body of troops, under the command of the Crown.] And after 1689 it became the practice for an Act, known as the Mutiny Act, to be passed in every year, whether in peace or war, which authorizes from year to year the maintenance of the regular forces deemed necessary for the service of the state, and contains temporary provisions as to their enlistment, discipline, and regulation (*o*).

In the year 1879, however, it was thought desirable to obviate the necessity for passing an elaborate annual

(*n*) Robertson, *Hist. of Charles V.* i. 24.

(*o*) The paid forces, now authorized, consist of 420,000 men, exclusive of the forces actually serving in India. By the Royal Naval Reserve (Volunteer) Acts, 1859 and 1896, and the Naval Reserve (Mobilization) Act, 1900, provision is made for the establishment of a *reserve force* of seamen volunteers; and see further the Naval Reserve Act, 1900, and the Royal Naval Reserve Act, 1902. By the Reserve Forces Act, 1882, as amended by the Reserve Forces Act, 1890, Reserve Forces and Militia Act, 1898, and the Reserve Forces Act, 1900, provision is made for establishing a *reserve force* of men who have been in her Majesty's service, to be called the *Army Reserve*, and also a *reserve force* of militia, to be called the *Militia Reserve ;* and by the Merchant Shipping (Mercantile Marine Fund) Act, 1898, s. 6, provision has been made for securing a supply of boy-seamen for the Naval Reserve.

statute for this purpose, by enacting a code on this subject, of a more permanent character, which was embodied in the Army Discipline and Regulation Act, 1879, amended by the Regulation of the Forces Act, 1881, and repealed and re-enacted with amendments by the Army Act, 1881. This last-mentioned Act is directed to come into force by, and during the continuance of, an annual Act, to be passed for that purpose, but for no longer period, and to be subject to such provisions as may be specified or referred to in the annual Act. Accordingly, a short annual Army Act has been passed in each year from 1882 to the present time, specifying the number of soldiers which the Crown may lawfully keep on foot during the current year.

In this military code, provision is made for the manner in which the troops are to be enlisted and "billeted," that is, dispersed among the several innkeepers and victuallers throughout the kingdom (*p*); and regulations are laid down for the government of the army, and for every person subject to military law. By these regulations, the sovereign is empowered to make *Articles of War*, which shall be judicially taken notice of by all the judges, and in all courts whatsoever; and to erect, or grant authority to convene, *courts-martial*, with jurisdiction to try and punish offences according to such Articles of War, and the provisions of the Act (*q*). But in order to limit, as far as possible, the power thus conceded to the Crown, it is enacted, that nothing contained in the Articles of War shall exempt any officer or soldier from being proceeded against by the ordinary course of law (*r*); and where an

(*p*) As to the period of enlistment (which cannot be entered into for a longer period than twelve years), see Army Act, 1881, s. 76; and Reserve Forces and Militia Act, 1898, ss. 1, 2.

(*q*) Army Act, 1881, ss. 69, 70; *Home* v. *Lord Bentinck* (1820), 2 Brod. & B. 130; *In re Mansergh* (1861), 1 B. & S. 400. See *Manual of Military Law* (War Office, 1899).

(*r*) Army Act, 1881, s. 162.

officer or soldier is accused of any offence against a subject of the realm, punishable by the known laws of the land, he is to be delivered over to the civil magistrates (*s*). Moreover, no person may, by such Articles of War, be subjected to suffer any punishment extending to life or limb, or be kept in penal servitude, for any crime which is not expressed to be so punishable by the Army Act, 1881, itself; nor be punished in any manner which shall not accord with the provisions of that Act. The Act itself accordingly fixes the punishments to be inflicted, and makes provision as to certain specific offences, many of which, especially when committed on active service, render the offender liable to suffer *death;* the death penalty attaching, in all cases, to cowardice, desertion, and wilful disobedience (*t*).

The system of military law thus devised for the army is by other statutes made applicable to a limited extent to the militia and volunteers also, when these are on duty (*u*). And no relief can be afforded by the ordinary courts of law from the sentences, however erroneous, of courts-martial, so long as they exceed not their jurisdiction; the only remedy being an application to the sovereign in council, praying for a revision of the proceedings (*x*).

The establishment of such a system in this country doubtless involves, notwithstanding the care with which its provisions are guarded, a partial departure from the principles of our free constitution; and this is recognized in the Act itself. For it is set forth in the preamble of the Act of 1879, and of each annual Army Act, that "no man can be forejudged of life or limb, or subjected

(*s*) Army Act, 1881, s. 41 (a), (b).

(*t*) Sects. 4, 5, 41, 44.

(*u*) Militia Act, 1802, ss. 89, 103; Army Discipline and Regulation Act, 1879, s. 173; Army Act, 1881, ss. 175—184.

(*x*) *Grant* v. *Gould* (1792), 2 H. Bl. 100, 101; *Marks* v. *Frogley*, [1898] 1 Q. B. 888; and see the Army Act, 1881, ss. 54, 57.

" in time of peace to any kind of punishment within this " realm, by martial law, or in any other manner than by " judgment of his peers, and according to the known and " established laws of this realm " (*y*), a doctrine entirely conformable to, and apparently founded on, the Petition of Right, which enacts, that no commission shall issue to proceed according to martial law (*z*). But the *policy* of the Army Acts may be easily defended, in that it is impossible by any other means to maintain the proper severity of military discipline: and their *legality* is put beyond all question by the omnipotence of parliament, —the authority of parliament being sufficient even to supersede altogether the established course of justice, and to proclaim martial law in its stead. Thus, by the statute passed in Ireland, in 1798, for the suppression of the rebellion there, it was provided, that the lord lieutenant might during the rebellion, whether the courts of justice were open or not, issue his orders to the officers of the forces and others, to take the most vigorous measures for suppressing it, and to punish all rebels by death or otherwise, as to them should seem expedient, &c., and to cause all persons arrested as rebels to be tried in a summary manner by courts-martial, &c. Upon the same principle, the Habeas Corpus Act may, upon emergency, be suspended, as has been more than once done; but save by means of such special Act authorising it, martial law cannot be proclaimed in this country (*a*).

On the other hand, careful provision has been made by law for the benefit of soldiers, including the allowance of pensions to those who are sick, hurt and maimed (*b*), and the establishment of the royal hospital at Chelsea for such

(*y*) Army (Annual) Act, 1902.

(*z*) 3 Car. 1 (1627), c. 1; 31 Car. 2 (1679), c. 1; Hale, *Hist. C. L.* ch. 2.

(*a*) 4 Inst. 123; 2 Hawk. 5, 9. On the much discussed question of what *martial* law really means, see Law Quarterly Review, vol. xviii., pp. 133—158.

(*b*) See Patriotic Funds Acts,

as are worn out in their duty (*c*) ; and army chaplains (*d*), and army schools (*e*), are provided for their religious and general welfare. Moreover, soldiers, if on actual service, may make *nuncupative* wills, and dispose of their goods, wages, and other personal chattels, without those solemnities which the law requiries in other cases (*f*) ; and, on their death, soldiers' effects are collected, and, subject to the payment of their *regimental debts*, the balance is remitted to the persons entitled thereto (*g*).

As regards our *naval* forces, the law relating to these is very similar to that which regulates the Army. [The Royal Navy of England hath ever been its greatest defence and ornament ; it hath been assiduously cultivated, even from the earliest ages ; and yet, so vastly inferior in point of naval power, were our ancestors to the present age, that even in the maritime reign of Queen Elizabeth, Sir Edward Coke thinks it matter of boast, that the royal navy of England then consisted of *three and thirty* ships (*h*).

Many laws have been made for the supply of the royal navy with seamen ; for their regulation when on board ; and to confer privileges and rewards on them during and after service.

1. With regard to the SUPPLY OF SEAMEN.—The power of *impressing* seafaring men for the sea service by the royal commission was always submitted to with great reluctance ; but the practice of impressing is of very

1867, 1881, 1886, and 1899, as to the *patriotic fund* ; and Pensions Act, 1839, and Pensions and Yeomanry Pay Act, 1884, as to *pensions*, &c.

(*c*) Chelsea and Kilmainham Hospitals Act, 1826 ; Army Pensions Act, 1830 ; Army (Artillery, etc.) Pensions Act, 1833 ; Drouly Fund Act, 1838 ; 6 & 7 Vict. (1843), c. 31 ; Chelsea Pensions (Abolition of Poundage) Act, 1847 ; Chelsea Hospital Act, 1876 ; and Royal Military Asylum, Chelsea (Transfer) Act, 1884.

(*d*) Army Chaplains Act, 1868.

(*e*) Army Schools Act, 1891.

(*f*) Wills Act, 1837, s. 11 ; *In the Goods of Spratt*, [1897] P. 28 ; *Gattward* v. *Knee*, [1902] P. 99.

(*g*) Regimental Debts Act, 1893

(*h*) 4 Inst. 50.

[antient date, and hath been uniformly continued by a regular series of precedents to a comparatively recent time. It is, in fact, part of the common law (*i*), some few people (such as *ferrymen*) being, however, privileged; and it hath been recognized by the courts (*k*), and also by divers Acts of Parliament. Thus, the 2 Ric. II. (1378) st. 1, c. 4, speaks of mariners being arrested and retained for the king's service, as of a thing well known and practiced without dispute, and the statute provides a remedy against their running away; by the 2 & 3 Ph. & M. (1555) c. 16 (which, however, was repealed by the 7 & 8 Geo. IV. (1827) c. lxxv. s. 1), if any waterman, using the river Thames, hid himself during the execution of any commission of pressing for the king's service, he was made liable to heavy penalties; by the 5 Eliz. (1562) c. 5 (since repealed by the Sea Fisheries Act, 1868), no fisherman was to be taken by royal commission to serve as a mariner, but the commission was first to be brought to two justices of the peace, inhabiting near the sea coast where the mariners were to be taken, to the intent that the justices might choose out and return such a number of able-bodied men, as in the commission was contained, to serve her Majesty. And, by several other Acts, especial protections were allowed to seamen in particular circumstances, to exempt them from being impressed.]

But, besides this method of impressing, the royal navy is also largely, and in ordinary times exclusively, supplied by voluntary enlistment (*l*). Great advantages in point of wages are given to volunteer seamen; also, where they are already engaged in the merchant service, they are enabled to leave it, without punishment or forfeiture, in order to engage in his Majesty's navy (*m*).

(*i*) Foster, Rep. 154.

(*k*) *R.* v. *Tubbs* (1776), 2 Cowp. 512.

(*l*) Naval Enlistment Acts, 1835, 1853, and 1884.

(*m*) Merchant Shipping Act, 1894, ss. 195—197, continuing the like provisions contained in several earlier Acts of the reign.

2. The METHOD OF ORDERING SEAMEN in the royal fleet is closely analogous to that established for the government of the Army, namely, by "Articles of the Navy" corresponding to the "Articles of War." The first Articles of War for the navy were drawn up in 1661 (*n*), but the scheme of naval discipline contained in these rules was modified by the 22 Geo. II. (1749) c. 33, and the present scheme is to be found in the Naval Discipline Act, 1866, as amended by the Naval Discipline Act, 1884. The navy constituting the Indian Marine Service is subject to the rules of discipline contained in the Indian Marine Service Act, 1884. All these Acts are permanent in their character, and do not require, as in the case of the army, to be brought into force for a specified time by an annual Act passed for that purpose. By these Acts for the government of the navy, a great variety of offences are defined or specified, some of which have reference to a state of war (*o*), while others are of a nature to which the ordinary law applies; and the appropriate punishment for each offence is also mentioned or specified. The Acts also provide, that any offence triable under the Acts may be tried and punished by court-martial (*p*); and any offence triable under the Acts not committed by an officer, and not thereby made capital, may (under such regulations as the Admiralty may from time to time issue), be summarily tried and punished by the officer in command of the ship to which the offender belongs, subject, however, to certain restrictions. But nothing in the Acts is to supersede the

(*n*) 13 Car. 2, st. 1, c. 9.

(*o*) These are chiefly, misconduct in the presence of the enemy, communications with the enemy, neglect of duty, mutiny, insubordination, and desertion; and some of these are capital. But, except in the case of mutiny, the punishment of death, when awarded by the sentence of a court-martial, is not to be inflicted till the sentence has been confirmed by the Admiralty, or by the commander-in-chief on a foreign station. (See Naval Discipline Act, 1866, s. 53.)

(*p*) Naval Discipline Act, 1866, s. 56.

authority of the courts of ordinary jurisdiction in her Majesty's dominions (*q*).

3. With regard to the Privileges conferred on Sailors, these are pretty much the same with those conferred on soldiers. Careful provision has been made for their relief when maimed, wounded or superannuated (*r*); and they have also the power of making nuncupative wills (*s*).

Besides seamen ordinarily so called, we may remark here, that in his Majesty's fleet and naval service are to be found the forces commonly termed the *Royal Marines*. The discipline and regulation of these also (when quartered, as they often are, on shore, or sent to do duty on board of transports or merchant ships, or in other circumstances in which they are not subject to the Naval Discipline Act, 1866) is provided for by the Army Act, 1881, the provisions of which, with certain modifications, include the Royal Marine forces (*t*).

(*q*) Sect. 101.

(*r*) Greenwich Hospital Act, 1845; 12 & 13 Vict. (1849), c. 28; 13 & 14 Vict. (1850), c. 24; Greenwich Hospital Acts, 1865 to 1898; and see, as to the *patriotic fund*, p. 573, note (*x*), *supra*.

(*s*) Wills Act, 1837, s. 11; Navy and Marines (Wills) Acts, 1865 and 1897.

(*t*) See further as to *naval coast volunteers*, Naval Volunteers Act, 1853; Royal Naval Reserve Volunteer Acts, 1859 and 1896; Naval Reserve Act, 1900; as to the *coast guard*, Coast-Guard Service Act, 1856; as to the *Naval Medical Supplemental Fund Society*, 24 & 25 Vict. (1861), c. 108, and 26 & 27 Vict. (1863), c. 111; as to *Chatham Dockyards*, 24 & 25 Vict. (1861), c. 41; and generally as to national and imperial defences, p. 499, note (*g*), *supra*.

CHAPTER IX.

OF THE NOBILITY AND OTHER RANKS.

[THE civil state consists of the nobility and the commonalty. Of the nobility, or lords temporal, as forming, together with the bishops, one of the branches of the legislature, we have already spoken (*a*); we are here to consider the nobility and the commonalty according to their several degrees of honour and worship. And first, of the NOBILITY.

All degrees of nobility and honour are derived from the Crown as their fountain; and the king may institute what new titles he pleases. Hence it is that all degrees of honour are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons.

1. A *duke*, though in respect of his title of nobility inferior in point of antiquity to many others, is yet superior to all of them in rank; for his is the first title of dignity after the royal family. Among the Saxons, the *duces* signified, as among the Romans, the commanders or leaders of the armies; and in the laws of Henry the First, as translated by Lambard, these *duces* are called *heretochii*. But after the Norman conquest our kings did not honour any of their subjects with this title, till the time of Edward the Third, who, in the eleventh year of his reign, created his son, Edward the Black Prince, Duke of Cornwall; and in the reign of Queen Elizabeth, A.D. 1572, the whole order became utterly extinct, being, however, revived, about fifty years afterwards, by her successor, in the person of George Villiers, Duke of Buckingham (*b*).

(*a*) See *ante*, bk. IV. pt. I. ch. I. (*b*) Camden *Britan.* tit. *Ordines*; Spelman, *Gloss.* 191.

2. [A *marquess* (*marchio*) is the next degree of nobility. His office was, formerly, to guard the frontiers and limits (*marches*) of the kingdom, and, in particular, the marches of Wales and Scotland ; and the name was therefore given them of lords marchers, or *marquesses*. Their authority in Wales was abolished by the 26 Hen. VIII. (1534), c. 6 ; and the title had, long before, become a mere title of nobility,—Robert Vere, Earl of Oxford, being created Marquess of Dublin, by Richard of Second, in the eighth year of his reign (1384) (*c*).

3. An *earl* is a title of nobility so antient that its original cannot clearly be traced out. But this much seems tolerably certain, namely, that among the Saxons there were *ealdormen* (*i.e.*, elder men), signifying the same as *senior* or *senator* among the Romans, and synonymous, or nearly so, with *eorls* (*d*) ; and these were called also *schiremen*, because they had each of them the civil government of a shire. In Latin, earls were called *comites*, from being the king's attendants (*e*) ; and after the Norman conquest, they were for some time called *counts* or *countees*, and their shires were called counties. The name of *earl* is now become a mere title of nobility, an earl not having had (as such) since the Conquest anything to do with either the civil or the military government of the county. In writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him "trusty and well beloved *cousin;*" an appellation which is as antient as the reign of Henry the Fourth, who, being either by his wife, his mother, or his sisters, actually related or allied to every earl in the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public

(*c*) 2 Inst. 5.

(*d*) But the word *earl* is not the same as *eorl*, being probably derived from the Danish *jarl*. See, however, Pollock and Maitland, *Hist. Eng. Law*, i. 32.

(*e*) Bracton, l. 1, ch. 8; Flet. l. 1, ch. 5.

[acts. And from this, the usage has descended to his successors.

4. The sheriff of the county was sometimes called *vice-comes;* which name was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it. And Henry the Sixth, in the eighteenth year of his reign (1439), created John Beaumont a peer by the name of *viscount* Beaumont, which was the first instance of the kind (*f*).

5. A *baron* is the most general title of nobility; and formerly every one of the peers of superior rank had also a barony annexed to his higher title (*g*). But it hath sometimes happened, that when a peer with a barony annexed to his title hath been raised to a new degree of peerage, the two titles have, in the course of a few generations, descended differently, one perhaps to the male descendants, and the other to the heirs general, whereby the earldom or other superior title hath subsisted without the barony. And there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours; so that now the rule doth not hold universally that all peers are barons.

The original and antiquity of baronies have occasioned great inquiries among our English antiquaries; and the opinion, which seems the most probable one, is that the barons were the same as the lords of manors, or the tenants *in capite* of the Crown (*h*). For it may be collected from King John's *Magna Carta*, that originally all lords or owners of estates holding under that tenure were called barons, and had seats in the great council or parliament; till the conflux of them became so large and troublesome, that the king was obliged to divide them, and to summon only the principal tenants, called the greater barons, in person, leaving the smaller ones to be summoned by the

(*f*) 2 Inst. 5.
(*g*) *Ibid.*,
(*h*) Spelm. *Glos. Baronia.*

[sheriff, to sit by representation in another house, which gave rise to the separation of the two houses of parliament (*i*). By degrees, the title came to be confined to the greater barons, or lords of parliament, only; and there were no other barons among the peerage, but such as were summoned by writ in respect of the tenure of their lands or baronies, till Richard the Second first made a barony a mere title of honour, by conferring it on divers persons by his letters patent (*k*).

Having made this short inquiry into the original of our several degrees of nobility, we shall next consider the manner in which a peerage may be created. The right of peerage seems to have been originally territorial, that is to say, it was annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were, in right of those estates, allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign. And, when the land was alienated, the dignity passed with it as appendant. Thus, in one view, the bishops still sit in the house of lords in right of succession to certain antient baronies annexed, or supposed to be annexed, to their episcopal lands (*l*); and similarly, in the eleventh year of Henry the Sixth (1433), the possession of the castle of Arundel was adjudged to confer on its possessor an earldom *by tenure* (*m*), *i.e.*, the right of claiming a seat in the house of lords by title of tenure (*n*). But afterwards, when alienations

(*i*) Gilb. *Hist. of Exch.* ch. 3; Seld. *Tit. of Hon.* pt. 2, ch. 5, xxi. See, however, Pollock & Maitland, *Hist. of Eng. Law*, i. 279—282.

(*k*) Co. Litt. 9 b; Seld. *Jan. Angl.* 2, § 66.

(*l*) *Vide sup.* p. 366; Seld. *Table Talk*, tit. *Bishops in Parliament.*

(*m*) Seld. *Tit. of Hon.* pt. 2, ch. 9, v.; Cruise, *Dig.* vol. iii. p. 185.

(*n*) In the Fourth Report (1825) of the Lords Committee on Peerages, p. 338, it is stated, that there were then two dignities, namely, Earl of Arundel and Baron of Abergavenny, which had always been claimed as dignities *by tenure*. But the question as to whether a barony could be claimed by tenure, has since been closely examined in the *Case of the Berkeley Peerage* (1861), 8 H. L. C. 21; and it

[grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of being territorial became personal; and a peerage may now be created without connecting it even nominally with any particular locality (*o*), though it has remained usual in creating a man a peer to name him baron, earl, or the like, of some specified place. The year 1295 may be probably considered as the moment when tenure ceased to be the sole title to the peerage, and *began* to be no title at all (*p*).

Peers are now created either by writ, or by patent; for those who claim by prescription must suppose either a writ or a patent made to their ancestors, which by length of time has been lost. The creation by writ or by king's letter, is by summons to attend the house of peers, by the style and title of that barony which the king is pleased to confer; and the creation by patent is by royal grant of the degree of peerage. The creation by writ is the more antient way; but a man is not ennobled thereby, unless he actually takes his seat in the house of lords. And some have been of the opinion, that there must be at least two writs of summons, and a sitting in two distinct parliaments to evidence an hereditary barony (*q*); and therefore the most usual, because the surest, way, is to grant the dignity by patent, for then the grant enures according to the limitations thereof, though the grantee should never himself make use of it (*r*). But it is still usual to call up by writ only, the eldest son of a peer to the house of lords, in the name

was in that case decided (26th February, 1861), that no legal right to be summoned to or to sit in parliament can exist, at the present day, in any tenant for life or devisee of hereditaments, as such. And it was observed, that no *earldom* by tenure now exists, that of Arundel having (as such) been put an end to by the 3 Car. 1 (1627), c. iv.

(*o*) Cruise, *Dig.* vol. iii. p. 219.

(*p*) Medley, *Eng. Const. History*, 141.

(*q*) Whitelocke, *Parl.* ch. 114.

(*r*) Co. Litt. 16 b.

[of his father's barony, because there is no danger in that case of his children losing the nobility; for in case their father never takes his seat, they will succeed to their grandfather. Creation by writ has also one advantage over that by patent. For a person created by writ holds the dignity to him and the heirs general (that is, male and female) of his body (*s*), without any words to that purport in the writ; but in letters patent, there must be words to direct the inheritance, else the dignity enures to the grantee only for life (*t*). And a man or woman may, by patent, be created noble for their own lives, and the dignity not descend to their heirs at all.] It must, however, be noticed that, though the Crown may create a life dignity of this kind, such dignity will not make the holder a peer of parliament; this point having been clearly decided in 1856 in the *Wensleydale Peerage Case*, when the committee of privileges of the house of lords declared that the letters patent granted to Mr. Baron Parke, creating him Lord Wensleydale for life, did not entitle him to sit and vote in parliament (*u*). But now, under the Appellate Jurisdiction Acts, 1876 and 1887, every lord of appeal in ordinary appointed to aid the house of lords in the hearing and determination of appeals, if he is not otherwise entitled to sit as a member of the house of lords, becomes by virtue of his appointment entitled *during his life* to rank as a baron, and to sit and vote in the house of lords. A peerage, however, is (except in the case last mentioned) always now conferred by letters patent so as to give an hereditary dignity, sometimes to the heirs male of the body of the grantee (*v*), sometimes to the heirs

(*s*) Cruise, *Dig.* vol. iii. p. 223; *Devon Peerage Case* (1831), 5 Bligh (N.S.) 313; *Wiltes Claim of Peerage* (1869), L. R. 4 H. L. 126.

(*t*) Co. Litt. 9, 16.

(*u*) For the historical argument on this matter, see Anson, *Law and Custom*, vol. ii. ch. vi. § 4.

(*v*) Cru. *Dig.* vol. iii. pp. 218, 245; *Devon Peerage Case*, *ubi sup.*; *Wiltes Claim of Peerage* (1869), L. R. 4 H. L. 126.

female of his body, and sometimes to the heirs general of his body. It may even be made to descend to some particular heirs male; as where it is limited to a man, and the heirs male of his body by Elizabeth, his present lady, and not to such heirs by any former or future wife. It may also be limited to the grantee and his heirs collateral as well as lineal; and if a peerage be granted to a man "*and his heirs male*," it will descend, in default of heirs male of his body, to his heirs male collateral (*x*). Moreover, the right of primogeniture holds good among *males* in the descent of dignities, though it is otherwise as to females (*y*); for if a man holds a peerage to him and the heirs of his body, and dies, leaving only daughters, the dignity is in *abeyance*, and the king may in that case bestow it on which of them he pleases. Where there is no charter or instrument of creation in existence, and nothing to show how the dignity is to descend, the *primâ facie* presumption of law is, that it is descendible to the heirs male (*z*).

[Let us next take a view of a few of the principal incidents of nobility, properly so regarded. First, we must observe, that when accused of treason or felony, a peer of the realm is tried by his *peers*. For the great are more or less obnoxious to the popular envy; and were they to be judged by the people, they would, moreover, be deprived of the privilege of being tried by their peers, which is secured to the whole community by *Magna Carta*, c. 29 (*a*). But this does not apply in the case of libel, perjury, conspiracy, and other misdemeanors; for, in all these cases a peer is tried by an ordinary jury in the court where the indictment is found. It is said,

(*x*) *Devon Peerage Case* (1831), 5 Bligh (N.S.) 313.

(*y*) Cru. *Dig.* vol. ii. p. 244.

(*z*) See *Mar Peerage*, *Kellie's Claim* (1876), 1 App. Ca. 1; and see the 48 & 49 Vict. (1885), c. 48, "An Act for the restitution of the *antient* dignity and title of Earl of Mar."

(*a*) For the latest instance of a trial in the House of Lords, see the *Trial of Earl Russell*, [1901] A. C. 446.

[also, that the privilege does not extend to bishops, who, though they are lords of parliament, and sit there by virtue of their baronies, are yet not ennobled in blood, and consequently are not peers with the nobility (*b*) ; and it was so resolved by the house of lords in 1692. But both the resolution, and the doctrine of ennobled blood, on which it is supported, are apparently devoid of historical justification (*c*). As regards peeresses, however, the 20 Hen. VI. (1442) c. 9 has declared the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm (*d*). If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers ; but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity. For as by marriage it is gained, by marriage it is also lost (*e*). Yet if a duchess dowager marries a baron, she continues a duchess still, for all the nobility are *pares*, and therefore it is no degradation (*f*).] By courtesy, all dowager peeresses, though afterwards married to commoners, are ordinarily addressed by their former title ; and it seems that a peer, who has been divorced by his wife, cannot by any proceedings in the ordinary courts restrain her, upon her marriage with a commoner, from continuing to use her former title (*g*).

Secondly, peers have certain privileges with reference to judicial proceedings ; for a peer, sitting in judgment on his peers, gives not his verdict upon oath, like an ordinary juryman, but upon his honour (*h*), and he used to answer to proceedings in chancery upon his honour, and not upon his oath (*i*). But, when he is examined as a

(*b*) 3 Inst. 30, 31.

(*c*) See Stubbs, *Const. Hist.* iii. 443, n. 2.

(*d*) *Isabel Countess of Rutland's Case* (1606), Moore, 769 ; 2 Inst. 50 ; 6 Rep. 52 b ; Staundf. P. C. 215.

(*e*) Dyer, 79 ; Co. Litt. 16.

(*f*) Co. Litt. 16 b ; 2 Inst. *ubi sup.*

(*g*) *Cowley* v. *Cowley*, [1901] A. C. 450.

(*h*) 2 Inst. 49.

(*i*) *Meers* v. *Stourton* (1711), 1 P. Wms. 146.

[witness, either in civil or criminal cases, he must be sworn (*k*); for the respect which the law shows to the honour of a peer does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis* (*l*). The honour of peers was, however, so highly esteemed by the law, that it was more penal to spread false reports regarding them and certain other great officers of the realm, than it was regarding other men; such scandal being called *scandalum magnatum*, and, by divers antient statutes (*m*), subjecting the offender to peculiar punishments.] But it is to be noted that, as respects punishment for crimes committed by him, a peer, when once convicted, is on the same footing with other men.

The privileges of peerage, it is lastly to be observed, are not extended by the law to such persons as hold *foreign* titles of nobility, who are in this country no more than commoners. But since the Union with Scotland all the peers of Scotland are peers of Great Britain, and, save a seat in the House of Lords, have all the attendant privileges; and since the Union with Ireland all peers of Ireland, with the exception of such as are elected members of the House of Commons, have all the privileges of peerage, save only the right to a seat in the House of Lords.

And here it is convenient to observe, that the peerage, regarded as a dignity, presents the following varieties, that is to say:—(1) Peerages which in their creation were peerages of England; (2) Peerages which in their creation were peerages of the United Kingdom of Great Britain; (3) Peerages which in their creation were peerages of the united peerages of Great Britain *and* Ireland; (4) Peerages which in their creation were peerages of Scotland; and (5) Peerages which in their

(*k*) *Meers* v. *Lord Stourton* (1711), Salk. 512.

(*l*) *Earl of Lincoln's Case* (1626), Cro. Car. 64.

(*m*) 3 Edw. 1, (1275), c. 34; 2 Ric. 2, st. 1 (1378), c. 5; 12 Ric. 2 (1388), c. 11: all repealed by Statute Law Revision Act, 1887.

creation were peerages of Ireland. The dates of the first class are antecedent to the Union with Scotland in 1707 ; of the second class subsequent to that event, and antecedent to the Union with Ireland in 1801 ; of the third class subsequent to the union last mentioned ; of the fourth class antecedent to the Union with Scotland ; and of the fifth class either antecedent to the Union with Ireland or subsequent, for several Irish peerages have been created since that event, under a power contained in the Act of Union with Ireland, allowing one Irish peerage to be created for every three which become extinct, till the number sinks to one hundred, below which the Irish peerage is not to be allowed to fall.

[A peer cannot surrender (*n*) or lose his nobility but by death or attainder, though there was an instance in the reign of Edward the Fourth of the degradation of George Neville, Duke of Bedford, by *Act of Parliament*, on account of his poverty, which rendered him unable to support his dignity (*o*). That is, however, a singular instance, which serves at the same time, by having happened once, to show the power of parliament ; and, by having happened but once, to show how tender the parliament hath been in exerting so high a power. It was once asserted, indeed, that if a baron wasted his estate, so that he was not able to support his dignity, the king might degrade him (*p*) ; but the later authorities have held, that a peer cannot be degraded, save by *Act of Parliament* (*q*).] If, however, a peer become a bankrupt, he is, by the Bankruptcy Act, 1883, disqualified thereby from sitting and voting in the House of Lords until his bankruptcy is determined ; and, so long as he is disqualified, no writ of summons can be issued to him.

(*n*) The *Purbeck Case* (1678), Collins' Baronage, 306.

(*o*) 4 Inst. 355.

(*p*) Moore, 768.

(*q*) *Earl of Shrewsbury's Case* (1612), 12 Rep. 107 ; *Knowle's Case* (1694), 12 Mod. 56.

[Secondly, as to the *Commonalty of this Realm*.—These, like the nobility, are divided into several degrees. But, as the lords, though different in rank, are all of them peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers amongst themselves, in respect of their want of nobility (*r*).

The first name of dignity, next beneath a peer, was formerly that of *vidames* (*vice-domini*), or *valvasors* (*vavasores*) (*s*), who are mentioned by our antient lawyers (*t*) as *viri magnæ dignitatis ;* and Sir Edward Coke speaks highly of them. But they are now quite obsolete ; and our legal antiquaries are not even agreed upon their original or antient office (*u*).

At the present time, therefore, the first dignity after the nobility, is a *knight* of the order of St. George, or *of the Garter* ; first instituted (in the opinion of Selden) by Edward the Third, in the eighteenth year of his reign (*v*). Next follows (but not till after certain *official* dignities, including among others, privy councillors, and the judges) a *knight banneret* (*x*), who, indeed, by the 5 Ric. II. st. 2 (1382) c. 4, and 14 Ric. II. (1390) c. 11, is ranked next after barons ; and his precedence before the younger sons of viscounts was confirmed to him by order of King James the First, in the tenth year of his reign (*y*). But in order to entitle himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war (*z*) ; otherwise he ranks after *baronets*, who are the next order. The title of *baronet* is a dignity of inheritance, created by letters patent, and

(*r*) 2 Inst. 29.

(*s*) Camden, *Britan. tit. Ordines.*

(*t*) Bracton, l. 1, ch. 8.

(*u*) See Pollock and Maitland, *Hist. of Eng. Law*, vol. i. p. 545, and Maitland, *Domesday Book*, p. 81.

(*v*) Seld. *Tit. of Hon.* pt. 2, ch. 5, xl. citing Froissart, vol. i. ch. 101.

(*x*) See the Table of Precedence, *post*, p. 591.

(*y*) Seld. *Tit. of Hon* pt. 2, ch. 11, iii.

(*z*) 4 Inst. 6.

[usually descendible to the issue male (*a*). It was first instituted by King James the First, in the year 1611, in order to raise a competent sum for the reduction of the province of Ulster in Ireland; and for this reason all baronets have the arms of Ulster superadded to their family coats (*b*). Next follow *knights of the Bath*, an order instituted by King Henry the Fourth, revived by King George the First, and newly regulated in the last reign (*c*); they are so called from the ceremony, formerly observed, of bathing on the night before their creation. The order consists of civil knights and military knights. After them come the *knights bachelors* (*d*), the most antient, though the lowest, order of knighthood amongst us; for we have an instance of King Alfred's conferring this order on his son Athelstan (*e*). Knights are called in Latin *equites aurati*,—*aurati* from the gilt spurs they wore, and *equites*, because they always served on horseback (*f*); and they are also called *milites*, because they formed a part of the royal army, in virtue of their feodal tenures, one condition of which was, that every one who held a knight's fee immediately under the crown, was obliged to be knighted, and to attend the king in his wars, or else to pay a fine for his non-compliance (*g*).

These, Sir Edward Coke says, are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship* (*h*); but before these last, the heralds rank all colonels, serjeants at law, and doctors in

(*a*) *Re Carnac* (1885), 30 Ch. D. 136.

(*b*) The arms of Ulster are, a hand *gules*, or a bloody hand, in a field *argent*.

(*c*) See London Gazette, 25 May, 1847; 16 Aug. 1850.

(*d*) The most probable derivation of the word bachelor is from *bas* and *chevalier*, an inferior knight; and thence latinized into the barbarous word *baccalaureus*. (Ducange, Bac.)

(*e*) Wil. Malms. lib. 2.

(*f*) Camd. *Brit. tit. Ordines*; Co. Litt. 74.

(*g*) 2 Inst. 594.

(*h*) 2 Inst. 667. The various orders or decorations granted by the Queen as Empress of India appear to be also mere names of *worship*.

[the three learned professions (*i*). And, by a recent order of Queen Victoria, the children of the law lords, who are only peers for life, are given precedence before baronets.

(*i*) The Table of Precedence as given by Blackstone (vol. i. p. 405) is here subjoined (with slight modifications); but its authority in some points at the present day can scarcely be relied upon, except with regard to those which are marked* (who are entitled to the rank there allotted them, by the 31 Hen. 8 (1539), c. 10); those marked † (who are entitled by the 1 W. & M. (1688), c. 21) and those marked ‖ (who are entitled by letters patent, 9, 10, and 14 Jac. 1). As to those marked ‡, their place depends on antient usage and custom; and as to them the following authorities may be consulted:—Seld. *Tit. of Hon.*; Camden, *Britannia*, tit. *Ordines*; Milles, *Catalogue of Honour*, edit. 1610; and Chamberlayne, *Present State of England*. It is to be observed, moreover, that the Judicature Acts, 1873 to 1884, contain provisions with regard to the rank and precedence among themselves of the judges of the *Court of Appeal* and of the *High Court of Justice*, and of certain officers therein. (See the Supreme Court of Judicature Acts, 1873 (s. 11), 1875 (s. 6), 1877, 1879, and 1881.

TABLE OF PRECEDENCE.

* The king's children and grandchildren.
* ———— brethren.
* ———— uncles.
* ———— nephews.
* Archbishop of Canterbury.
* Lord Chancellor or Keeper, if a baron.
* Archbishop of York.
* Lord Treasurer,
* Lord President of the Council,
* Lord Privy Seal,
* Lord Great Chamberlain,
* Lord High Constable,
* Lord Marshal,
* Lord Admiral,
* Lord Steward of the Household,
* Lord Chamberlain of the Household,

above all peers of their own degree. (if barons.)

* Dukes.
* Marquesses.
‡ Dukes' eldest sons.
* Earls.
‡ Marquesses' eldest sons.
‡ Dukes' younger sons.
* Viscounts.
‡ Earls' eldest sons.
‡ Marquesses' younger sons.
* Secretary of State, if a bishop.
* The Bishop of London.
* ———— Durham.
* ———— Winchester.
* Bishops.
* Secretary of State, if a baron.
* Barons.
† Speaker of the House of Commons.
† Lords Commissioners of the Great Seal.
‡ Viscounts' eldest sons.
‡ Earls' younger sons.
‡ Barons' eldest sons.
‖ Knights of the Garter.
‖ Privy Councillors.

[Esquires and gentlemen are confounded together by Sir Edward Coke, who observes, that every esquire is a gentleman (*k*); and a gentleman is defined to be one *qui arma gerit*, who bears coat armour, the grant of which adds gentility to a man's family, in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least who had borne some curule office. But it is somewhat unsettled, what constitutes the distinction of *esquire*; for it is not an estate, however large, that confers this rank upon its owner (*l*). Camden distinguishes esquires the most accurately, when he reckons up four sorts of them (*m*),—1. The eldest sons of knights, and their eldest sons, in perpetual succession (*n*); 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession,—both which species of esquires, Sir Henry Spelman entitles *armigeri natalitii* (*o*); 3. Esquires

‖ Chancellor of the Exchequer.
‖ Chancellor of the Duchy.
‖ Chief Justice of the King's Bench (or of England).
‖ Master of the Rolls.
‖ Chief Justice of the Common Pleas (now obsolete).
‖ Chief Baron of the Exchequer (now obsolete).
The Judges [and Barons of the Coif].
‖ Knights Bannerets, royal.
‖ Viscounts' younger sons.
‖ Barons' younger sons.
Law Lords' children.
‖ Baronets.
‖ Knights Bannerets.
‡ Knights of the Bath.
‡ Knights Bachelors.
‖ Baronets' eldest sons.
‖ Knights' eldest sons.
‖ Baronets' younger sons.
‖ Knights' younger sons.
‡ Colonels.
‡ Serjeants-at-Law.
‡ Doctors.
‡ Esquires.
‡ Gentlemen.
‡ Yeomen.
‡ Tradesmen.
‡ Artificers.
‡ Labourers.

N.B. Married women and widows are entitled to the same rank among each other as their husbands would respectively have borne between themselves, unless such rank is merely professional or official; and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers.

(*k*) 2 Inst. 668.
(*l*) (1859), 2 El. & El. 317.
(*m*) 2 Inst. *ubi sup.*
(*n*) *Ibid.* 667.
(*o*) *Gloss.* 43.

[created by the king's letters patent, or other investiture, and their eldest sons (*p*); and, 4. Esquires by virtue of their offices, *e.g.*, justices of the peace, and others who bear any office of trust under the crown, and who are named esquires in their commission or appointment (*q*). To these may be added barristers-at-law (*r*), the esquires of knights of the Bath, whom to the number of three each knight constitutes at his installation, and all foreign peers who, as well as the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings (*s*). As for *gentlemen*, says Sir Thomas Smith, they be made good cheap in this kingdom; for whosoever can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman (*t*). A *yeoman* is he that hath free land of forty shillings by the year; who was thereby formerly qualified to serve on juries, to vote for knights of the shire, and to do any other act, which the law requires of one that is *probus et legalis homo* (*u*).

The rest of the commonalty are *tradesmen*, *artificers*, and *labourers;* and as to these as well as others, it was provided by the 1 Hen. V. (1413), c. 5, that they must be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all *indictments* or other legal proceedings on which process of outlawry was to be

(*p*) The creation of esquires by way of investiture has long been disused. When so created, they used to be invested *calcaribus argentatis*, to distinguish them from the *equites aurati*.

(*q*) See *Talbot* v. *Eagle* (1809), 1 Taunt. 510.

(*r*) *R.* v. *Brough* (1748), 1 Wils. 244.

(*s*) 3 Inst. 30; 2 Inst. 667.

(*t*) *Commonw. of Eng.* b. 1, ch. 20.

(*u*) 2 Inst. 668.

[awarded, in order, as it would seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process.] But no indictment, under the law as it now stands, is insufficient for want of, or by reason of any imperfection in, the addition, or description, of a defendant (*x*)

(*x*) *Vide post*, bk. VI., ch. XIV.

CHAPTER X.

OF MAGISTRATES AND OTHER PUBLIC OFFICERS.

[In a former chapter of these Commentaries we distinguished magistrates into supreme, and subordinate, or secondary (*a*). Hitherto, we have considered the former kind only, viz. the supreme legislative power, or parliament, and the supreme executive power, which is the king. We will now proceed to inquire into the rights and duties of the principal subordinate magistrates. In this inquiry, however, we shall not be called upon to investigate the powers and duties of his majesty's great officers or principal secretaries of state, because they have not any considerable share of magistracy conferred upon them (*b*), and the functions which they exercise by virtue of certain modern statutes (*c*) are not of such a nature as to constitute them subordinate magistrates. Neither shall we here treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice; because they will find a more proper place in Book V. of these Commentaries. Nor, again, is this the place to speak of mayors and aldermen, or other officials engaged in the administration of local government, whose rights and duties will be discussed under the Social Economy of the Realm (Part III. of this Book). But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are those who are found

(*a*) *Vide sup.* p. 361.

(*b*) Com. Dig. *Officer*, E. 8; *Entick* v. *Carrington* (1765), 2 Wils. 275.

(*c*) *E.g.*, Prisons Act, 1835; Fugitive Offenders Act, 1881, Part I.

[dispersed throughout all parts of the kingdom bearing jurisdiction and authority, that is to say, those representatives of the royal authority whose functions are confined to particular places, such as *sheriffs*, *coroners*, *justices of the peace*, and *constables*.

I. First, *The Sheriff*.—The sheriff is an officer of very great antiquity; and his name is said to be derived from two Saxon words, *scyre gerefa*, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, not (as has been erroneously supposed) (*d*), because he was the deputy of the earl or *comes*;] for even before the time of legal memory the earl had nothing to do with the government of any county (except in the case of the palatine earldoms), and it was not to him but to the sheriff that the crown committed the *custodium comitatus*. The sheriff was the governor of the shire, the captain of "its forces, the pre-"sident of its court, a distinctively royal officer appointed "by the king, dismissible at a moment's notice, strictly "accountable to the exchequer" (*e*). The name *vice-comes* is probably a mere attempt to translate the Saxon *scyre gerefa*.

[Sheriffs were formerly chosen by the inhabitants of the several counties: in confirmation of which it was ordained by the *Articuli Super Cartas* (28 Edw. I. (1300) c. 8), that the people should have the election of sheriffs in every shire where the shrievalty was not of inheritance. Formerly, in some counties, the sheriffs were hereditary; and a shrievalty of inheritance might descend on, and be executed by, a female. For example, the shrievalty of Westmoreland having been granted by King John to Robert de Veteripont and his heirs, it vested at one period in Anne, Countess of Pembroke; who exercised the office in person, and at the assizes at Appleby sat with the judges on the bench (*f*). Afterwards, this particular

(*d*) Dalton, *Sheriffs*, ch. 1.

(*e*) Pollock and Maitland, *Hist. of Engl. Law*, vol. i. 533.

(*f*) See Co. Litt., by Hargrave, 320.

[shrievalty came by descent to the Earl of Thanet; and on the death of that nobleman in 1849, without issue, it became a question whether the office passed under a devise thereof in his will, or escheated to the Crown. To remedy this inconvenience, all hereditary claims and title to the office of sheriff of Westmoreland were abolished in 1850 (*g*), and the Crown was empowered to appoint as in other counties; and this provision is continued in the Sheriffs Act, 1887. The City of London, also, had at one time the inheritance of the shrievalty of Middlesex vested in their body under a charter of Henry the First, on condition of their paying 300*l.* a year to the king's exchequer; and the Sheriffs Act, 1887 (*h*), recognized and continued this right of election. But the Local Government Act, 1888 (*i*), provided that the Crown (and not the city) should appoint the sheriff of Middlesex; that the Crown should appoint the sheriff for the county of London created by that Act, and that (with the consent of the city) such sheriff might exercise his jurisdiction in the city also (*k*); and that the city sheriffs should have no jurisdiction except in the city (*l*). The popular election of the sheriff, in all probability, required also the royal approbation; and these elections growing tumultuous, they were put an end to by the 9 Edw. II. (1315), st. 2, under which the sheriffs were to be thenceforth assigned by the chancellor, treasurer, and judges. The Statute of Cambridge (12 Ric. II. (1388), c. 2), ordained, that all that should be called to name or make justices of the peace, *sheriffs*, and other officers of the king, should be sworn to act indifferently, and to appoint no man that sued either privily or openly to be put in office, but such only as they should judge to be the best and most sufficient (*m*). And the custom ever since the time

(*g*) 13 & 14 Vict. c. 30.
(*h*) Sect. 33.
(*i*) Sect. 46 (6).
(*k*) Sect. 40 (2).
(*l*) Sect. 41 (8).
(*m*) See also 14 Edw. 3 (1340), st. 1, c. 7; 23 Hen. 6 (1445), c. 9; 21 Hen. 8 (1529), c. 20;

[of Fortescue (*n*), who was chief justice and chancellor to Henry the Sixth, was, that all the judges, together with the other great officers and privy councillors, should meet in the Exchequer (now represented by the King's Bench Division of the High Court of Justice) (*o*) on the morrow of All Souls (changed by the Michaelmas Term Act, 1751 (*p*), to the morrow of St. Martin, *i.e.*, 12th November), and then and there the judges should propose three persons for each county to be reported, if approved of, to the king, who should afterwards appoint one of them to be sheriff. And though in one case it was laid down that Queen Elizabeth might, by her prerogative, make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium* (*q*), yet this was afterwards adjudged bad law; the doctrine of *non obstante*, which sets the prerogative above the law, having been effectually demolished by the Bill of Rights (*r*).] Under the Sheriffs Act, 1887, s. 6, the annual appointment of sheriffs is made at the Royal Courts of Justice on the 12th day of November in every year, in the manner heretofore in use, and by the same high officers, or two of them, together with the judges, or two of them. And by the same Act, in continuance of a similar provision in the Fines Act, 1833, whenever any person is duly pricked or nominated to be sheriff of any county, a warrant is to be made out and signed by the clerk to the privy council, and transmitted by him to the person so appointed; and this appointment so made is of the same effect as if by patent under the great seal. A duplicate of the warrant is within ten days from the date thereof to be transmitted by the clerk of the privy council to the clerk of the peace for the county; and the sheriff so appointed continues in office until his successor is duly and fully appointed. In the

Michaelmas Term Act, 1751, s. 12; Supreme Court of Judicature Act, 1873, s. 96.

(*n*) *De Leg. Angliæ*, ch. 24.

(*o*) Judicature Act, 1881, s. 16.

(*p*) See s. 12.

(*q*) Dy. 225, 226.

(*r*) 2 Inst. 559.

event of his dying within the term of his office, the under-sheriff takes his place, and acts as *occasional* sheriff (*s*).

[Sheriffs, by virtue of several old statutes, are to continue in office for one year, and no longer; and yet it hath been said, that a sheriff may be appointed *durante bene placito* (*t*), as indeed the form of their appointment expresses (*u*). Their office determines therefore on their death, or by the expiration of the year of office, whichever event first happens; and formerly it determined also on the demise of the Crown, but it is not now determined by that event (*x*). By the Sheriffs Act, 1887, s. 5, continuing a like provision of the 1 Ric. II. (1377), c. 11, no man that has served the office of sheriff for one year can be compelled to serve the same again within three years after, if there be any other sufficient person within the county.] But otherwise the discharge of the office of sheriff is compulsory upon the party chosen; and if he refuses to serve, having no legal exemption, he is liable to an indictment or information (*y*). And it is said, that no man can be exempt from this office but by Act of Parliament or letters patent (*z*).

By the Sheriffs Act, 1887, s. 4, continuing a like provision contained in the 14 Car. II. (1662), c. 21, no person shall be assigned for sheriff, unless he have sufficient lands within the county to answer the king and his people (*a*); and as the sheriff may have the custody of men of the greatest property in the country, his own estate ought certainly to be large, that he may be above all temptation to permit them to escape, or to join them in their flight.

(*s*) Sheriffs Act, 1887, s. 25.

(*t*) 4 Rep. 32 b.

(*u*) Dalt. *Sheriffs*, 8.

(*x*) Sheriffs Act, 1887, s. 3.

(*y*) 9 Rep. 46; *Harrison* v. *Evans* (1767), 3 Bro. P. C. 465; *R.* v. *Woodrow* (1788), 2 T. R. 731.

(*z*) Watson, *Office and Duty of a Sheriff*, p. 5.

(*a*) 9 Edw. 2 (1315), st. 2; 2 Edw. 3 (1328), c. 4; 5 Edw. 3 (1331), c. 4.

In antient times, accordingly, this office was frequently executed by the nobility, and by persons of the highest rank in the kingdom, and not infrequently by bishops; though it is now committed, in general, to commoners, and exclusively to laymen (*b*).

The powers and duties of the sheriff are various, and are chiefly as follows:—

1. He is charged with the duties already sufficiently expounded in regard to parliamentary elections (*c*); and he is bound to hold a sheriff's county court, whenever the holding of such court is required for the purpose of an election or for any other specific purpose, but not otherwise (*d*). To the sheriff also, writs for the trial of disputed facts arising in certain classes of actions might, formerly, have been directed, under the Civil Procedure Act, 1833; but by the County Courts Act, 1867, s. 6, he was relieved from this burthen, though he still remains charged with the assessment of damages under writs of inquiry or interlocutory judgments, and also with the assessment of compensation in certain cases of compulsory purchase under the Lands Clauses Consolidation Act, 1845.

2. [In his character as keeper of the king's peace, both by common law and special commission, he is, during his office, the first man in the county, and superior in rank to any nobleman therein (*e*). He may apprehend and commit to prison all persons who break the peace, or attempt to break it; he may bind any one in a recognizance to keep the peace; and he is bound, *ex officio*, to pursue and take all traitors, murderers, and other misdoers, and to commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing offenders, he may command all the people of his county (or *posse comitatûs*) to attend

(*b*) Spelm. *Gloss. Vice-com.*
(*c*) *Vide sup.* bk. IV. pt. I. ch. I.
(*d*) Sheriffs Act, 1887, s. 18; *R.* v. *Diplock* (1869), L. R. 4 Q. B. 549.
(*e*) 1 Roll. Rep. 237.

[him (*f*); which summons every person above fifteen years old, and under the degree of a peer, is bound upon due warning to attend (*g*), under pain of fine and imprisonment (*h*).]

3. The sheriff is also bound to execute all process issuing from the High Court of Justice, and is required to attend on the judges, when they come into the county at the assizes, on which occasions he attends with javelin men to keep order; but by the County and Borough Police Act, 1859, the magistrates of the county may, if they think fit, direct order to be kept at the assizes by the county police instead, and this provision is continued by the Sheriffs Act, 1887 (*i*). In civil causes, supposing the case to be such that an order issues for the arrest and imprisonment of the defendant under the provisions of the Debtors Act, 1869, in order to prevent his quitting England and so prejudicing the plaintiff in the prosecution of his action, the sheriff is required to effect the arrest and to take the prescribed security that the defendant will not quit England without leave of the court (*k*). In any action, when the cause comes to trial, he must summon and return the jury, when a jury is required; and when the trial is ended, he must see the judgment of the court carried into execution (*l*). In all these matters, the sheriff, like other ministerial officers, is liable, at the suit of the party grieved, to an action for the negligent or improper discharge of his duty, *e.g.*, for an escape (*m*).

(*f*) Dalt. ch. 95; Sheriffs Act, 1887, s. 8.

(*g*) Lamb. *Eiren*, 315.

(*h*) 2 Hen. 5 (1414), st. 1, c. 8; Sheriffs Act, 1887, s. 8.

(*i*) Sect. 9.

(*k*) See the Debtors Act, 1869, s. 6.

(*l*) As to fees and poundage payable to the sheriff on the execution of civil process, see Sheriffs Act, 1887, s. 20, and *Maybery* v. *Mansfield* (1846), 9 Q. B. 754; *Miles* v. *Harris* (1862), 12 C. B. (N.S.) 550; *Shoppee* v. *Nathan & Co.*, [1892] 1 Q. B. 245.

(*m*) Formerly he was liable for the escape of prisoners (*Barrack* v. *Newton* (1841), 1 Q. B. 525; *Gordon* v. *Laurie* (1846), 9 Q. B. 60); but this is now otherwise as regards prisoners confined in any prison subject to the Prison Act, 1877. See Sheriffs Act, 1887, ss. 16, 29 (1) (c).

[In criminal matters, also, he returns the jury ; and he is responsible for the due execution of the sentence of the court, whether it consists in the imposition of a fine, or when it extends to the infliction of death (*n*). But the sheriff is, by the express directions of the Great Charter (*o*), forbidden to hold any pleas of the Crown, *i.e.*, to try any criminal charge ; and the Sheriffs Act, 1887, in continuance of that provision, expressly enacts that he shall not hold pleas of the crown, and his tourn (*i.e.*, his half-yearly *tour* through the hundreds of the county as royal commissioner, to hold a court in each) (*p*) is abolished. Neither may the sheriff act as an ordinary justice of the peace during the time of his office (*q*) ; for that would be equally inconsistent, the sheriff being in many respects the servant of the justices.]

Though the sheriff's authority extends, in general, over the whole of his county, yet there formerly existed many *liberties* within counties which were exempt from the sheriff's jurisdiction therein. Thus, any town being a county of itself was also, in general, exempt from the jurisdiction of the county within which it was situate, and had a sheriff of its own ; and this exemption was recognised by the Sheriffs Act, 1887 (*r*). These *liberties* were districts in regard to which grants were formerly made by the crown to individuals, conferring on them or their bailiffs the exclusive privilege, or franchise, of executing legal process therein (*s*) ; and when it became necessary to execute a writ within such a liberty, the course was to direct it to the sheriff of the county as in ordinary cases, but the *execution* of it belonged by law to

(*n*) Sheriffs Act, 1887, s. 13. As to his jurisdiction and responsibility in respect of prisoners under sentence of death, see the Prison Acts, 1865 and 1877, s. 32 ; and as to his duties in respect of persons arrested on civil process, see the Sheriffs Act, 1887, s. 14.

(*o*) Cap. 17.

(*p*) Pollock and Maitland, *Hist. of Engl. Law*, vol. i. pp. 530, 558.

(*q*) 1 Mar. (1554), sess. 2, c. 8, repealed and re-enacted by Sheriffs Act, 1887, s. 17.

(*r*) Sects. 34, 35, 36.

(*s*) 5 Geo. 2 (1732), c. 27, s. 3.

the bailiff of the liberty, unless (as was usually done) (*t*), the writ was framed with a clause of *non omittas*, as it was called, specially authorizing the sheriff to enter. And now, under the Sheriffs Act, 1887, s. 34, while these liberties are recognised, it is provided that the lord of such liberty (in the Act called the bailiff of such franchise) shall either hold the office himself or appoint responsible bailiffs, for whom he shall be answerable, for the return and execution of writs ; and the sheriff appoints a deputy at the lord's expense, the deputy residing in or near the franchise, and receiving and opening in the sheriff's name all writs the return or execution of which belongs to the bailiff of the franchise, and issuing to such bailiff the warrant required for the due execution of such writs. The bailiff of the franchise then becomes liable for the non-execution, mis-execution, or insufficient return of the writs, and for all misconduct incident thereto ; but in case of the *non-return* of any such writ, the sheriff, on returning that he has delivered the writ to the bailiff, may be ordered to execute the writ notwithstanding the franchise, and to cause the bailiff to attend before the High Court of Justice and to answer for his non-execution of the writ.

4. [It is the sheriff's duty also, as the king's bailiff, to preserve the rights of the Crown within his bailiwick, for so his county is frequently called in the writs (*u*) ; he therefore seizes to the king's use all lands devolving upon the crown by escheat for want of heirs ; levies all fines and forfeitures ; and seizes and keeps all waifs, wrecks, estrays, and the like, unless they be granted to some subject (*x*). He was formerly charged also with collecting the king's rents within his bailiwick ; but he has now been relieved of this latter duty (*y*).

(*t*) *Cf.* Rules of the Supreme Court, App. H., No. 7.

(*u*) Fortescue, *De Leg.* ch. 24.

(*x*) Dalt. ch. 9. See the Fines Act, 1833, and the Sheriffs Act, 1887, ss. 21, 22, as to the regulations for auditing the sheriff's accounts, &c.

(*y*) Fines Act, 1833, s. 12.

[To execute these various offices, the sheriff has under him many inferior officers, viz., an under-sheriff, a deputy, and bailiffs. These must neither buy, sell, nor farm their offices, on forfeiture of 500*l.* (*z*) ;] and the sheriff himself may not "let to ferm" his county, or any part thereof (*a*). By the Sheriffs Act, 1887, s. 23, continuing a like provision in the Fines Act, 1833, it is provided, that every sheriff shall, within one calendar month next after the notification of his appointment in the Gazette, by writing under his hand, nominate some fit person to be his *under-sheriff*, and transmit a duplicate thereof to the clerk of the peace of the county, to be by him filed among the records of his office. And by sect. 24 of the same Act, every sheriff is to appoint a sufficient *deputy*, having an office within a mile of the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting all rules and orders made as to the execution of any process or writ directed to the sheriff. And the delivery of process to the deputy is, in law, delivery to the sheriff (*b*).

The under-sheriff usually performs all the duties of the office of sheriff (*c*), except the few in which the personal presence of the high sheriff is necessary ; but the under-sheriff is only to a certain extent recognised by the law. For the law holds the sheriff himself responsible, in general, for all acts done or omitted by his under-sheriff ; and considers the latter, where the duty is improperly performed, as exempt from any action for negligence at the suit of the party grieved (*d*). It was enacted by the 42 Edw. III. (1368), c. 9, that no under-sheriff should abide in his office above one year ; and if he did, then by the 23 Hen. VI. (1444) c. 7, he was made to forfeit 200*l.*,

(*z*) Estreats Act, 1716 ; Sheriffs Act, 1887, s. 27.

(*a*) Sheriffs Act, 1887, s. 19.

(*b*) *Woodland* v. *Fuller* (1840), 11 A. & E. 859.

(*c*) Militia Act, 1882, s. 40.

(*d*) *Cameron* v. *Reynolds* (1776), Cowp. 403.

a very large penalty in those early days. But by the Estreats Act, 1716, s. 8, if the sheriff died, the under-sheriff continued in his office until a new high sheriff was appointed ; and this provision is substantially repeated in the Sheriffs Act, 1887 (s. 25).

[Bailiffs or sheriffs' officers (*e*) are either *bailiffs of hundreds* or *bound* bailiffs, which latter are sometimes called *special* bailiffs. Bailiffs of hundreds are appointed over those respective districts, by the sheriffs, to collect fines therein and to summon juries ; to attend the judges and justices at the assizes and quarter sessions ; and to execute writs and processes in the several hundreds (*f*). But, as these are generally plain men, and not much inclined to this latter part of their office, that of serving writs, making arrests, and levying executions, it is now usual to join other bailiffs with them ; who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey. The sheriff being civilly responsible for the official misdemeanours of these bailiffs (*g*), they are therefore annually bound to him in an obligation with sureties for the due execution of their office ; and thence are called bound bailiffs, which the common people have corrupted into a much more homely appellation.] It is to be observed, however, that besides these officers the sheriffs may appoint, on the application of any party to a civil suit, persons named by such party, for the purpose of executing

(*e*) Besides the *sheriffs' bailiffs*, there are also *bailiffs of liberties* (*vide sup.* p. 601); *bailiffs of county courts* (as to whom, see the County Courts Act, 1888, ss. 33—37, replacing the County Courts Acts, 1846, ss. 31—34; 1849, s. 10; 1850, s. 4; 1856, ss. 14, 16, 55, 60, 83, 84; and 1867, ss. 21, 22, 30); and *bailiffs of inferior courts* generally (as to whom, see the Inferior Courts Act, 1844; *Braham* v. *Watkins* (1846), 16 M. & W. 77; *Tarrant* v. *Baker* (1853), 14 C. B. 199).

(*f*) As to bailiffs' fees, see *Walbank* v. *Quarterman* (1846), 3 C. B. 94.

(*g*) *Drake* v. *Sikes* (1797), 7 T. R. 113; *Barsham* v. *Bullock* (1839), 10 A. & E. 23.

any particular process therein ; and persons so appointed are properly called *special* bailiffs. Whenever a party thus chooses his own officers, he is held to discharge the sheriff from all responsibility for what is done by them in the execution of the process (*h*).

[II. *The Coroner.*—The office of *coroner* is also a very antient one at the common law (*i*), though not indeed of equal antiquity with that of the sheriff ; for the *general* institution of coroners appears to have been no earlier than, and due to, an ordinance of 1194, although there are traces at a more remote time of an office of keeping the pleas of the crown (*k*). The holder of this office was called coroner (*coronator*), because he was formerly charged with keeping (*custodire*) the pleas of the Crown, or such wherein the king was more immediately concerned (*l*) ; and in this light, the lord chief justice of the King's Bench was the principal coroner of the kingdom, and might, if he pleased, exercise the jurisdiction of a coroner in any part of the realm (*m*). But there were also particular coroners for every county in England,—usually four, but sometimes six, and sometimes a smaller number (*n*).

The coroner used to be chosen by the freeholders at a county court held by the sheriff for the purpose ; and by the writ *de coronatore eligendo* (*o*), it was expressly commanded the sheriff, *quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*] This mode of election was continued by the Coroners Act, 1887, s. 11, but by the Local Government Act, 1888, s. 5, the writ

(*h*) *Ford* v. *Leche* (1837), 6 A. & E. 699 ; *Balson* v. *Meggat* (1836), 4 Dowl. 557 ; *Alderson* v. *Davenport* (1844), 13 M. & W. 42 ; *Botten* v. *Tomlinson* (1847), 16 L. J., C. P. 138.

(*i*) See Jervis, *Office and Duties of Coroners ;* Com. Dig. *Officer*, G. ; Gross, *Introduction to Select Coroners' Rolls* (Selden Society).

(*k*) Pollock and Maitland, *Hist. of Engl. Law*, vol. i, p. 534.

(*l*) 2 Inst. 31 ; 4 Inst. 271.

(*m*) 4 Rep. 57.

(*n*) F. N. B. 163.

(*o*) F. N. B. *ubi sup.* ; County Coroners Act, 1860, s. 9.

de coronatore eligendo is now to be directed to the county council, and the county council are made the electors.

[In order to secure that the persons to be elected coroners should be of suitable estate, it was enacted by the Statute of Westminster the First (*p*), that none but lawful and discreet knights should be chosen as coroners (*q*); but it was subsequently thought sufficient (*r*), if a man had lands enough to be made a knight, that is, lands to the amount of 20*l.* per annum, a qualification very inadequate, in modern times, to the object. And accordingly, at one period it was made matter of complaint that the office of coroner was no longer undertaken by gentlemen of property; and that though formerly no coroners would condescend to be paid for serving their country, they now only desired to be chosen for the sake of the perquisites.] In our own times, however, the coroners have been in general persons of unquestionable respectability, and their position in life such as to cast no discredit on their employment. But by the Coroners Act, 1887, s. 12, it is still required, that every coroner for a county shall have land in fee sufficient in the county to answer to all manner of people (*s*).

By the Coroners Act, 1844 (*t*), coroners might be appointed for *districts* within counties, instead of for the county at large; and by that Act, as well as by the County Coroners Act, 1860, provisions were made as to the manner of their election (*u*). By the later statute, all former provisions for the remuneration of county coroners

(*p*) 3 Edw. 1 (1275), c. 10.

(*q*) 2 Inst. 32.

(*r*) F. N. B. 163; Com. Dig. *Officer*, G. 4.

(*s*) *Cf.* 14 Edw. 3. (1340), st. 1, c. 8.

(*t*) This Act repealed 58 Geo. 3 (1818), c. 95; *R.* v. *Lechmere* (1851), 16 Q. B. 284.

(*u*) *R.* v. *Diplock* (1869), L. R. 4 Q. B. 549. As to the coroners for the counties of Durham and Chester, see Coroners Act, 1887, s. 38; as to coroners for the county of Lancaster, see Coroners Act, 1887, s. 39; and as to the coroners for the county of York, see Yorkshire Coroners Act, 1897.

by fees, mileage, and allowances were repealed, and in lieu thereof they were to be paid by salary (*v*) ; and if any coroner refused or neglected to hold an inquest, it was made lawful for the attorney-general to apply to the King's Bench Division for a rule calling on him to show cause why such inquest should not be held (*x*), which provision is continued by the Coroners Act, 1887, s. 6. With respect to the election of coroners, however, it is to be observed, that the Crown, as regards the coroner of the household, and certain lords of franchises, as regards franchise-coroners, may appoint coroners for the household and for their respective liberties or franchises, by their own mere grant, and without election (*y*) ; and by the Municipal Corporations Act, 1882 (s. 171), re-enacting a like provision contained in the Municipal Corporations Act, 1835, the council of every borough having a separate court of quarter sessions was enabled to appoint a fit person to be coroner for the borough.

[Coroners are chosen for life ; but they may be removed from their offices, and a coroner is *ipso facto* removed on being made sheriff, the one office being deemed incompatible with the other. He may also be removed by the writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in, or lives in an inconvenient part of, the county (*z*).] The matter has also been dealt with by statute ; for by the Coroners Act, 1887, s. 8 (1), the lord chancellor may remove any coroner for inability or for misbehaviour. And by s. 8 (2) if a coroner is adjudged guilty of extortion or corruption, of wilful neglect of

(*v*) County Coroners Act, 1860, ss. 3, 4 ; *Ex parte Driffield* (1871), L. R. 7 Q. B. 207.

(*x*) County Coroners Act, 1860, s. 5.

(*y*) *Ibid.* s. 9 ; Coroners Act, 1887, ss. 29—32.

(*z*) F. N. B. 163, 164 ; *Ex parte Parnell* (1820), 1 Jac. & Walk. 451.

duty, or of misbehaviour in the discharge of his duty, the Court convicting him may remove him from his office, and a new coroner is in such case to be duly appointed in his place. But nothing in the Act is to prejudice the jurisdiction of the lord chancellor or the High Court as to the removal of, or otherwise in relation to, a coroner (*a*).

An Act of 1843 (c. 83), after a preamble to the effect that at the time of that Act passing, the coroners of boroughs and liberties were empowered by law to appoint *deputies* to act in their stead in certain cases, but that the coroners of counties were not, provided that it should be lawful for every coroner of a county, city, riding, liberty, or division, by writing under his hand and seal, to appoint from time to time a proper person, to be approved by the lord chancellor, to act for him as his deputy in the holding of inquests, or during his illness or absence from any lawful or reasonable cause (*b*). By the Coroners Act, 1887, s. 13, every county coroner is enabled, subject to the approval of the lord chancellor, to appoint such a deputy (*c*); and by the Coroners Act, 1892, every coroner, whether for a county or a borough, is both enabled and required to appoint a deputy, such deputy being some one approved by the chairman or mayor, as the case may be, of the council.

[The office of a coroner is in part judicial and in part ministerial, but principally *judicial;* and his office, as ascertained by the 4 Edward I., *De officio coronatoris* (1276), consisted, principally, in inquiring, when any person was slain, or died suddenly, or in prison, concerning the manner of his death.] When such a death happened, it was the duty of the township to give notice of it to the coroner (*d*). The coroner thereupon issued a

(*a*) Coroners Act, 1887, s. 35.

(*b*) *R.* v. *Perkin* (1845), 7 Q. B. 165.

(*c*) *Ex parte Deputy Coroner for Middlesex* (1861), 6 H. & N. 501.

(*d*) *R.* v. *Justices of Kent* (1809), 11 East, 229.

precept to the constables of the four, five, or six next townships, to return a competent number of good and lawful men to appear before him at such a place, to make an inquisition concerning the matter; and under the Coroners Act, 1887, s. 3, when the coroner is informed of a dead body lying within his jurisdiction, and there is reasonable cause to suspect that the death was violent, or unnatural, or inexplicably sudden, or took place in prison, or in any other proper case, he is to issue his warrant for the summoning of not less than twelve nor more than twenty-three good and lawful men to inquire as jurors touching the death.

The inquisition of the coroner must be held before the coroner as presiding officer, and his court is a court of record (*e*). The jury, who must still, as formerly, consist of twelve at least (*f*), are to be sworn and charged by the coroner, to inquire how the party came by his death (*g*). [The inquisition must be had *super visum corporis;* and at the first sitting of the inquest, the coroner and jurors must view the body (*h*), for if the body be not found the coroner cannot sit, except by virtue of a special commission issued for the purpose (*i*). By the common law, he was bound also to sit at the very place where the death happened, though not necessarily at the same place where the body was viewed, for the jury might have adjourned elsewhere to see the body if found more convenient (*k*).] Subsequently, however, by the Coroners Act, 1843, it was provided, that only the coroner within whose jurisdiction the body was *lying dead*, should hold the inquest, though the cause of death might not have arisen within his jurisdiction; and that in the case of any body found dead in

(*e*) 4 Inst. 271; *Garnett* v. *Ferrand* (1827), 6 B. & C. 611.

(*f*) 2 Hale P. C. 59.

(*g*) *Ibid.* 60; Coroners Act, 1887, s. 3 (3).

(*h*) *Ibid.* s. 4 (1).

(*i*) 2 Hale, P. C. 58; 2 Hawk. P. C. ch. 9, s. 23; *R.* v. *Ferrand* (1819), 3 B. & Ald. 260.

(*k*) 2 Hawk. P. C. ch. 9, s. 25; *R.* v. *Great Western Rail. Co.* (1842), 3 Q. B. 340.

the sea, or in any creek, river, or navigable canal within the flowing of the sea, (where there should be no deputy coroner for the jurisdiction of the admiralty of England,) the inquest should be held only by the coroner having jurisdiction in the place where the body was first brought to land (*l*). These provisions are continued by the Coroners Act, 1887, s. 7 (1); and by the same Act, s. 40 (1), for the purpose of inquests, every detached part of a county, riding, or division, is to be deemed to be within that county, riding, or division, by which the same is wholly surrounded, or, where it is partly surrounded by two or more counties, ridings, or divisions, within that one with which it has the longest common boundary.

At this inquisition, the coroner and jury must hear such evidence as is offered, to be given on oath (*m*) or affirmation (*n*); moreover, by the Coroners Act, 1887, s. 21, continuing a like provision contained in the Coroners (Ireland) Act, 1836, whenever it appears to the coroner that the deceased was attended at his death, or during his last illness, by any legally qualified medical practitioner, he may order the attendance of such practitioner as a witness at the inquest, and, where the deceased was not so attended, the attendance of any legally qualified medical practitioner, being at the time in actual practice in or near the place where the death happened. The Coroners Act, 1887, s. 4 (1), further enables the coroner to examine all persons whatsoever having knowledge of the facts whom he may think it expedient to examine; and, by s. 21 (2), he may also direct a *post mortem* examination, with or without an analysis of the contents of the stomach or intestines, provided, however, that if a sworn statement be made to him of the belief of the deponent, that the death was caused entirely or in part by the improper or negligent treatment of any person by him

(*l*) *R.* v. *Hinde* (1844), 5 Q. B. 944; *R.* v. *Ellis* (1846), 2 Car. & Kir. 470.

(*m*) *R.* v. *Scorey* (1748), 1 Leach, C. C. 43; 2 Hale, P. C. 62.

(*n*) Oaths Act, 1888.

named, such person shall not be allowed to perform or assist at the *post mortem* examination. Moreover, when it shall appear to the majority of the jury that the cause of death has not been satisfactorily explained by the witnesses in the first instance, they may name to the coroner, in writing, any other legally qualified practitioners, and require their attendance as witnesses, or for a *post mortem* examination, whether one shall have been previously performed or not. By section 22 of the Act, the medical witnesses are to be allowed proper remuneration for their attendance and trouble (*i.e.*, one guinea for attending, and two guineas for making a *post mortem* examination and attending), and they forfeit 5*l.* for every neglect to obey an order for their attendance; but there is a proviso, that in case of death in any hospital, infirmary, or lunatic asylum, no remuneration shall be allowed to any person whose duty it was to attend the deceased, as a medical officer of the institution.

The verdict must be found with the concurrence of at least twelve of the jury (*o*), and there are provisions to prevent the inquisition from being quashed on account of merely technical defects (*p*). If by such verdict any person be found guilty of murder or other homicide, or of being an accessory to murder before the fact, the coroner is to commit him to prison for further trial, and he must certify the inquisition, under his own seal and the seals of the jurors, to the King's Bench Division, or to the next assizes (*q*); but, in general, an *indictment* is laid before

(*o*) 2 Hale, P. C. 161; *Lambert* v. *Taylor* (1825), 4 B. & C. 138. By the Births and Deaths Registration Act, 1874, ss. 16, 20 (3), the coroner is directed, after the inquest, to inform the registrar of deaths for the district, of the finding of the jury as to the particulars of death required to be registered. See also Coroners Act, 1887, s. 45, and sched. 3.

(*p*) Coroners Act, 1887, s. 20, amending 6 & 7 Vict. (1843), c. 83; *R.* v. *Evett* (1827), 6 B. & C. 247; *In re Culley* (1833), 5 B. & Ad. 230; *In re Daws* (1838), 8 A. & E. 936.

(*q*) Coroners Act, 1887, s. 5; *cf.* 33 Hen. 8 (1541), c. 12; 2 West, *Symb.* s. 310; Cromp. 264; Tremain, P. C. 621; *R.* v. *White* (1860), 6 Jur. (N.S.) 868.

the grand jury at the same assizes to which the coroner's inquisition is returned. By the Coroners Act, 1887, s. 5 (3), the coroner is required to deliver the depositions of the witnesses to the officer of the court where the trial is to be(*r*); and by section 5 (1), the coroner has authority to bind by recognizance all who know or declare any thing material touching such offence, to appear at the court at which the trial is to be, either to prosecute or to give evidence against the party charged. Under the provisions of the last-mentioned section, amending the 22 Vict. (1859), c. 33, the coroner may, on a verdict of manslaughter, at his discretion, accept sufficient bail for the person so charged, for his appearance to take his trial at the next assize and general gaol delivery for the county.

It may be here noticed, that, by the Capital Punishment Amendment Act, 1868, the coroner of the jurisdiction to which the prison belongs, wherein judgment of death is executed on any offender, is expressly required to hold an inquest on the body within twenty-four hours after the execution, and to inquire thereat into, and ascertain the identity of the body, and whether the judgment was duly executed on the offender; and it is directed, that at such inquest neither any officer of the prison, nor any prisoner confined therein, shall be a juror (*t*).

[Another branch of the coroner's office is to inquire concerning treasure trove, who were the finders, and where the treasure is, and whether any one be suspected of having found and concealed it (*u*); but although it was

(*r*) See also Prosecution of Offences Act, 1879, s. 5.

(*s*) In cases of suicide, on a verdict of *felo de se*, the coroner at one time directed the remains to be interred in some public highway, a stake being previously driven through the body; but under the 4 Geo. 4 (1823), c. 52, a private interment in the usual churchyard or burial place was substituted. And the Interments (Felo de se) Act, 1882, which has repealed the 4 Geo. 4 (1823), c. 52, contains provisions to the like effect.

(*t*) Coroners Act, 1887, s. 3 (2).

(*u*) Coroners Act, 1887, s. 36; *Att.-Gen.* v. *Moore*, [1893] 1 Ch. 676.

[formerly part of his duties to inquire concerning shipwrecks, and to certify whether it was a wreck or not, and who were in possession of the goods, he is now relieved of that duty, and also of the duty of holding inquests on royal fish (*x*). He does not now hold the pleas of the crown, nor inquire as to the goods of felons, nor hold any inquest of felonies, save on inquisitions of death (*y*).

The coroner, as conservator of the king's peace, becomes also a magistrate by virtue of his appointment, having power to cause offenders to be apprehended, whether an inquisition has been found against them or not (*z*). But the *ministerial* office of the coroner is only as the sheriff's substitute in executing process; for when just exception can be taken to the sheriff for suspicion of partiality—as that he is himself interested in the action, or of kindred to either plaintiff or defendant—the process must then be awarded to the coroner, and not to the sheriff (*a*).

III. *Justices of the Peace.*—The common law hath ever had a special care and regard for the conservation of the peace; and, therefore, before the present constitution of justices was invented, there were peculiar officers, appointed by the common law, for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold, while others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute officii* still continue, but the latter sort are superseded by the modern justices.

The king is, by his office and dignity royal, the principal conservator of the peace within all his dominions (*b*); and the lord chancellor or keeper, the lord treasurer, the lord

(*x*) Coroners Act, 1887, s. 44.

(*y*) *Ibid.*

(*z*) Jervis, *Coroners*, 2nd ed. p. 30. A justice of the peace is not disqualified from acting by being elected coroner; *Davis* v. *Justices of Pembrokeshire* (1881), 7 Q. B. D. 513.

(*a*) 4 Inst. 271; Coroners Act, 1887, s. 15.

(*b*) Lambard, *Eirenarch.* 12.

[high steward of England, the lord mareschal, and the lord high constable of England (when any such officers are in being), the judges of the High Court by virtue of their offices, and the Master of the Rolls by prescription, are also conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it (*c*). The coroner is also, as we have seen, a conservator of the peace within his own county (*d*), as is the sheriff (*e*); and both may take a recognizance or security for the peace. Constables, tithing men, and the like, are also conservators of the peace within there own jurisdictions; and may apprehend all breakers of the peace, and commit them till they find sureties for keeping it (*f*).

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription (*g*), or were bound to exercise it by the tenure of their lands (*h*), or were chosen by the freeholders in full county court before the sheriff, the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis*" (*i*). But when Queen Isabel, the wife of Edward the Second, had contrived to depose her husband and to set up his son Edward the Third in his place, the new king, or his mother in his name, sent writs to all the sheriffs in England (the form of which writs is preserved by Thomas Walsingham) (*k*) giving a plausible account of the manner of his obtaining the crown, and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinheritance, and loss of life and limb. And, a few weeks after the date of these writs, it was ordained in parliament, that, for the better maintaining and keeping

(*c*) Lamb. 12.
(*d*) Britton, 3.
(*e*) F. N. B. 81.
(*f*) Lamb. 14.
(*g*) *Ibid.* 15.
(*h*) *Ibid.* 17.
(*i*) *Ibid.* 16. For the history of the justices of the peace before Edward III., and generally, see Medley, *Engl. Const. Hist.* pp. 392—401.
(*k*) Hist. A.D. 1327.

[of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors, should be *assigned* to keep the peace (*l*), which assignment was construed to be by the king's commission (*m*). And when, shortly afterwards, the 34 Edw. III. (1360), c. 1, gave them the power of trying felonies, they acquired the more honourable appellation of justices of the peace (*n*), and were uniformly thereafter *assigned* by the king, and no longer chosen by the freeholders.

The justices of the peace for each county, who are usually called the county justices, are generally selected on the recommendation of the lord lieutenant of the county (*o*), and are appointed by special commission under the Great Seal, the form of which was settled by the judges, in the year 1590, and continues with little alteration to this day (*p*). According to such form, the appointment is of them all, jointly and severally, to keep the peace in the particular county named (*q*); and of any two or more

(*l*) 1 Edw. 3 (1326), st. 2, c. 16; Lamb. 20.

(*m*) 4 Edw. 3 (1330), c. 2; 18 Edw. 3 (1344), st. 2, c. 2.

(*n*) Lamb. 23; 36 Edw. 3 (1362), c. 12; Reeves, *Hist. Eng. Law*, vol. ii. p. 472; vol. iii. pp. 216, 242, 265, 290; vol. iv. p. 154; *Harding* v. *Pollock* (1829), 6 Bing. 25.

(*o*) As to the justices in *boroughs* (whose office within their borough is for the most part similar to that of the county justices within their county), *vide post*, bk. IV. pt. III. ch. III. As to the justices in and near the metropolis (and the commissioners and assistant commissioners, receiver, and constables of the *police* of the metropolis), see Metropolitan Police Act, 1839; Metropolitan Police Courts, Acts, 1839, 1840; Indictable Offences Act, 1848, s. 29; Summary Jurisdiction Act, 1848, s. 33; Public Revenue and Consolidated Fund Charges Act, 1854 (Sched. B.); Metropolitan Police Acts, 1856, 1860, 1861; Metropolitan Police (Receiver) Act, 1861; Metropolitan Police Act, 1864; Metropolitan Police (Receiver) Act, 1867; Police Rate Act, 1868; Metropolitan Police Act, 1884; Metropolitan Police (Receiver) Act, 1895; Metropolitan Police Courts Acts, 1897 (cc. 14 and 26) and 1898; and Metropolitan Police Acts, 1897 (c. 42), and 1899.

(*p*) Lamb. 43. See the form of the writ, *ib.* 36.

(*q*) As to the power of county magistrates to act in *counties cor-*

[of them to inquire of and determine offences in such county committed; some particular justices, or one of them, being directed to be always included in such number, and no business to be done without their presence, the words of the commission running thus, *quorum aliquem vestrum* A. B. C. D. &c. *unum esse volumus*, whence the persons so named are usually called justices of the *quorum*. Formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum;* but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person, for the sake of propriety; nor is any exception now allowable, for not expressing in the form of the warrants, &c., that the justice who issues them is of the *quorum* (*r*). When any justice named in the commission intends to act under it, he sues out a writ of *dedimus potestatem* from the clerk of the crown in Chancery, empowering certain persons therein named to administer the oaths to him.] These oaths are the judicial oath and the oath of allegiance prescribed by the Promissory Oaths Act, 1868, s. 6, and, when required, an oath of qualification as to sufficiency of estate (*s*); and having taken these, the justice is at liberty to act. And it is to be observed, that justices of the peace act gratuitously, receiving neither neither salary nor fees, except that in certain populous districts, viz., in the metropolis and elsewhere, it has become the practice to appoint paid (or *stipendiary*) magistrates, any one of whom has the power

porate and other places of exclusive jurisdiction within the county, see Poor Relief Act, 1722, s. 3; Indictable Offences Act, 1848, s. 6. As to their jurisdiction in respect of *boroughs* within their county, see now the Muncipal Corporations Act, 1882, s. 154. As to their power in *detached parts* of other counties, see Counties (Detached Parts) Act, 1839; Indictable Offences Act, 1848, s. 7.

(*r*) Justices Act, 1753; Justices Quorum Act, 1766.

(*s*) Justices Qualification Act, 1744.

of two justices of the peace sitting in petty sessions (*t*). By virtue of the County Courts Act, 1888, s. 17, continuing a like provision contained in the County Courts Act, 1846, s. 20, any judge of a county court, whose name shall be inserted in the commission for the county, may act as a justice of the peace without a property qualification.

[Touching the number and qualifications of these justices, it was ordained by the 18 Edw. III. (1344), st. 2, c. 2, that *two* or *three* of the best reputation in each county should be assigned to be keepers of the peace; but these being found rather too few for that purpose, it was provided by the 34 Edw. III. (1360), c. 1, that one lord and three or four of the most worthy men in the county, with some learned in the law, should be made justices in every county. Afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary, by the 12 Ric. II. (1388), c. 10, and 14 Ric. II. (1390), c. 11, to restrain them, at first to six, and afterwards to eight in each county. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago) that the growing number of statute laws committed from time to time to the charge of justices of the peace has occasioned also, and very reasonably, their increase to a large number (*u*). As to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county; and the statute 13 Ric. II. (1390), st. 1, c. 7, ordered them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by the 2 Hen. V. (1414), st. 1, c. 4, and st. 2, c. 1, they must be resident in their several counties,

(*t*) See Metropolitan Police Courts Act, 1839, s. 9; Indictable Offences Act, 1848, s. 29; Summary Jurisdiction Act, 1848, s. 33; Stipendiary Magistrates Acts, 1858 and 1863; Municipal Corporations Act, 1882, s. 161; and as to the *deputies* of such stipendiaries, see Stipendiary Magistrates Act, 1869; Recorders, Magistrates, and Clerks of the Peace Act, 1888.

(*u*) Lamb. 34.

[though, by the Indictable Offences Act, 1848, s. 5, any justice of the peace for two or more adjacent counties may act in any of them, if resident in one. And because, contrary to the antient statutes above mentioned, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was afterwards enacted by the 18 Hen. VI. (1439), c. 11, that no justice should be put in the commission, if he had not lands to the value of 20*l.* per annum; and, the value of money becoming subsequently greatly altered, it was provided, by the Justices Qualification Acts, 1731 and 1744, that every justice of the peace acting for a county, with certain exceptions, must have in possession, and for his own benefit, an estate, either legal or equitable, of freehold, copyhold, or customary tenure, in fee, for life, or such term of years as in the Acts specified, of the clear yearly value of 100*l.*, or else a reversion, or remainder expectant upon such lease as therein mentioned, with reserved rents of the clear yearly value of 300*l.* per annum (*v*).] By the Justices Qualification Act, 1875, it has now been further provided, that a person who, being in full age, has for the space of two years immediately preceding his appointment been the occupier of a dwelling-house assessed to the inhabited house duty at a value of not less than 100*l.*, and has been rated to all rates and taxes in respect of such premises, and who is otherwise eligible, shall be deemed qualified to be appointed a justice of the peace for the county, riding, or division wherein such premises are situate. And it may be here observed, that the acts of a justice not properly qualified are valid, although he acts at his own peril; but it is otherwise if he be disqualified by reason of being sheriff (*x*).

[As the office of these justices is conferred by the crown, so it subsists only during the crown's pleasure, and is determinable in any one or other of the following five

(*v*) *Pack* v. *Tarpley* (1839), 9 A. & E. 468; *Woodward* v. *Watts* (1853), 2 El. & Bl. 452.

(*x*) *Maryate Pier Company* v. *Hannam* (1819), 3 B. & Ald. 266; Sheriffs Act, 1887, s. 17.

[events, namely: (1) By express writ under the Great Seal, discharging any particular person from being any longer justice (*y*); (2) By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it, seeing it may be revived again by another writ, called a *procedendo;* (3) By a new commission, which virtually, though silently, discharges all the former justices that are not included therein, for two commissions cannot subsist at once; (4) By accession to the office of sheriff, which, as we have just seen, disqualifies during the year of shrievalty (*z*). Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, this determined his office, seeing that he no longer answered the description in the commission. But afterwards it was provided, that, notwithstanding the accession of such new title of dignity, the justice on whom it was conferred should still continue a justice (*a*).] (5) It is provided by the Bankruptcy Act, 1883, s. 32 (as amended by s. 9 of the Act of 1890), that a debtor adjudged bankrupt shall be disqualified from being appointed or acting as a justice of the peace, until either his adjudication is annulled, or he obtains his discharge with a certificate that his bankruptcy was caused by misfortune and not by misconduct, or otherwise till five years from such discharge.

[The power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which have enlarged his jurisdiction. The commission, in the first place, empowers him to conserve the peace, and thereby gives him all the power of the antient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing criminals (*b*). It also empowers any two or more of the justices named therein to hear and determine

(*y*) Lamb. 68.
(*z*) 1 Mar. (1554), sess. 2, c. 8.
(*a*) 1 Edw. 6 (1547), c. 7.
(*b*) Indictable Offences Act, 1848; Summary Jurisdiction Acts, 1848 and 1879.

[offences, which is the ground of their criminal jurisdiction at *quarter sessions* (*c*), of which more will be said hereafter, when we have occasion to treat of crimes and the manner of their prosecution.] Besides the jurisdiction which the justices of each county at large exercise, in these and other matters, at the quarter sessions, authority is moreover given, by various statutes, to the justices acting for the several *divisions*, into which counties are for that purpose distributed (*d*), to transact different descriptions of business, at *special sessions* (*e*). By other Acts, two justices (or in some cases even a single one) are also empowered to try in a summary way, and without jury, such offences as the respective statutes particularize (*f*); and the meeting together of justices, for such and similar purposes, is denominated a *petty sessions* (*g*). The Local Government Act, 1888, s. 8, provides, that nothing in the Act shall transfer to the county councils thereby established any business of the quarter sessions or justices in relation to appeals by overseers or others in connection with rates; and although, by section 9 of the Act, the powers and duties of the quarter sessions and of justices out of session with

(*c*) Quarter Sessions Act, 1842.

(*d*) Division of Counties Act, 1828; Petty Sessional Divisions Acts, 1836 and 1859.

(*e*) County Rates Act, 1844.

(*f*) 7 & 8 Geo. 4 (1827), c. 30, s. 29; Summary Jurisdiction Act, 1848; Criminal Justice Acts, 1855 and 1856, ss. 18, 20, 22—24; Larceny Act, 1861, ss. 9, 14, 15, 17—19, 21—25, 33—37, 65, 66, 99, 105—110, 112, 120; Malicious Damage Act, 1861, ss. 22—25, 37—39, 41, 52, 62; Coinage Offences Act, 1861, ss. 23, 26, 27, 41; Offences against the Person Act, 1861, ss. 39, 40, 42—46, 72, 76; Summary Jurisdiction Act, 1879. As to an appeal from the determination of justices, on a point of law, decided on a summary conviction, see Summary Jurisdiction Act, 1857; Review of Justices Decisions Act, 1872; Supreme Court of Judicature (Procedure) Act, 1894, s. 2.

(*g*) As to providing places for holding *petty sessions*, see the Petty Sessions Act, 1849; Petty Sessions and Lock-up House Act, 1868; and Summary Jurisdiction Act, 1884; and as to *petty sessional divisions*, see the Bastardy Act, 1845, s. 10; Petty Sessions Act, 1849; Criminal Justice Acts, 1855 and 1856; and as to *clerks* of justices and of special and petty sessions, see Justices Clerks Act, 1877.

respect to the county police are now vested in the quarter sessions and the county councils jointly, yet the powers and duties of the justices as conservators of the peace are not thereby affected.

In view of the troublesome nature of the duties imposed upon magistrates, and the honorary character of the office, statutory provisions have been expressly made to protect a magistrate in the upright discharge of his office (*h*); which, among other privileges, entitle him, on being sued for any oversight, to tender amends, and exempt him in general from being sued at all after the expiration of six months from the commission of the injury (*i*). He is also freed from all liability where the matter was one within his jurisdiction, unless it can be proved that he proceeded maliciously and without reasonable and probable cause. Subject to these legislative protections, a justice of the peace is liable to an action by the party injured, for illegal acts done under colour of his office (*k*); he is also liable to be prosecuted criminally, by indictment or information, if guilty of any corrupt or malicious abuse in the exercise of his judicial discretion. On the other hand, when he acts fairly and *bonâ fide*, leave will not be granted to file an information against him, on account of a mere error in his proceedings (*l*).

It is impossible, on the plan of the present work, to enter minutely into the particulars of the accumulated authority from time to time committed to the charge of

(*h*) Justices Protection Act, 1848, *Prickett* v. *Gratrex* (1846), 8 Q. B. 1020; *Leary* v. *Patrick* (1850), 15 Q. B. 266; *Taylor* v. *Nesfield* (1854), 3 Ell. & Bl. 724; *Gelen* v. *Hall* (1857), 2 H. & N. 379; and Public Authorities Protection Act, 1893.

(*i*) Actions against metropolitan police magistrates must have been brought within *three* months (Metropolitan Police Courts Act, 1839, s. 53; *Barnett* v. *Cox* (1847), 9 Q. B. 617); but, *semble*, they may now be brought within *six* months (Public Authorities Protection Act, 1893).

(*k*) *Fernley* v. *Worthington* (1840), 1 Man. & Gr. 491; *Cave* v. *Mountain*, *ib.* 257.

(*l*) *R.* v. *Palmer* (1761), 2 Burr. 1162; *R.* v. *Borron* (1820), 3 B. & Ald. 432.

the justices of the peace. As regards administrative matters, the former powers of the justices have been vested, for the most part, in the county councils established by the Local Government Act, 1888, s. 3 ; but the reader will find [in the later editions of Dr. Burn's *Justice of the Peace* everything relating to this subject, both in antient and modern practice, collected with great care and accuracy.] And the authority of the justices and of the county councils respectively, as regards all the miscellaneous subject-matters of their jurisdiction, will be touched upon, more or less, in such subsequent parts of these Commentaries as relate to these several matters.

IV. *Constables.*—[The word *constable* is sometimes said to be derived from the Saxon *koning-staple*, and to signify the support of the king. But as we borrowed the name as well as the office of constable from the French, it seems more satisfactory to deduce it, with Sir Henry Spelman and Dr. Cowell, from that language ; wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire, and who was so called because (like the great constable of France, as well as the lord high constable of England) he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback (*m*). The office of lord high constable hath been long disused in England, except upon great and solemn occasions ; and the constables of whom we now speak are officers of a much humbler character, although they are said to have originally emanated from the office of the lord high constable (*n*).

Constables were formerly of two sorts, namely, *high* constables and *petty* constables. The high constables, who were ordained by the Statute of Winchester, 13 Edw. I. (1285), st. 2, c. 6 (*o*), were appointed at the

(*m*) Reeves, *Hist. Eng. Law*, vol. iii. p. 194; Hallam, *Mid. Ages*, vol. iii. p. 223, 7th edit.

(*n*) Lambard, *Constables*, 5.

(*o*) 4 Inst. 267.

[courts leet of the franchise or hundred over which they presided ; or, in default of that, by the justices at their special sessions, as directed by the County Rates Act, 1844, s. 8. The proper duty of the high constable seems to be to keep the peace within the hundred (*p*), as the petty constable does within the parish or township ; for the hundred was formerly answerable for all robberies committed therein by daylight. The high constables were also, by various statutes, charged with other duties, such as serving precepts and warrants or certain occasions.] But (the utility of these officers having become questionable) the justices for each county were directed by the High Constables Act, 1869, to consider and determine, whether it was necessary that the office of high constable of each hundred, or other like district, within their jurisdiction, should be continued ; and, as a matter of fact, they have now almost disappeared.

[The petty constables are inferior officers in every town and parish, formerly subordinate to the high constable of the hundred, and have two offices united in them, the one antient, the other modern. Their antient office was that of headborough, tithing man, or borsholder, officials who are as antient as the time of King Alfred ; and their modern office that of constable merely, which was instituted about the reign of Edward the Third, for the assistance of the high constable (*q*). The chief duty of petty constables is the preservation of the peace, though they also have other particular duties assigned to them by Act of Parliament, notably the service of the summonses and and execution of warrants of justices of the peace, relative to the apprehension and commitment of offenders. In the execution of these warrants, the petty constable enjoys certain protections similar to those conferred on the justices themselves ; *e.g.*, an action cannot be brought against him for what he does in his office, after the

(*p*) 4 Inst. *ubi sup.* (*q*) Lamb. 9.

[expiration of six months from the commission of the act (*r*). And by the Constables Protection Act, 1750, neither he, nor those acting in aid of him, may be sued without making the justice who signed the warrant a joint defendant, and on production of such warrant at the trial of the cause, the jury shall give their verdict for the constable, notwithstanding any defect of jurisdiction in the magistrate.] Further, in some cases, before an action is brought against a constable, a demand must previously be made for a perusal and copy of the warrant under which he acted (*s*).

Petty constables were formerly chosen by the jury at the court leet, or, if no court leet were held, then by two justices of the peace (*t*); but, with the object of improving the character of the force, which had in modern times become very inadequate to the performance of its duties, it was provided, by the Parish Constables Act, 1842 (*u*), that the justices should annually issue precepts to the overseers of each parish in their county, not being within any borough under the Municipal Corporations Act, requiring them to return a list of a competent number of men within such parish qualified and liable to serve as constables (*x*). In this class is included (subject, however, to numerous exceptions,) every able-bodied man there resident, between twenty-five and fifty-five years of age, who is rated to the poor rate or county rate, or is a tenant to the value of 4*l*. per annum. It was further provided, by the same Act, that the justices, at a special petty sessions of the peace to be holden for that purpose, should revise the list, and choose therefrom such number

(*r*) *Gowden* v. *Elfick* (1849), 7 D. & L. 194; Public Authorities Protection Act, 1893.

(*s*) Constables Protection Act, 1750, s. 6. Notice before action is not now required (Public Authorities Protection Act, 1893).

(*t*) *R.* v. *Mowley* (1835), 3 Ad. & El. 488.

(*u*) Amended by the Parish Constables Acts, 1844, 1850, and 1872.

(*x*) *R.* v. *The Overseers of North Bierley* (1858), El. Bl. & El. 519. As to constables in boroughs, see Municipal Corporations Act, 1882, ss. 190—196; Borough Constables Act, 1883.

of persons as they should deem necessary, having regard to the extent and population of the parish ; but no person who had already served was to be liable to do so again, till every other person liable should have served either in person or by substitute (*y*). It was also provided, that every person so chosen should serve for a year, or until another should be appointed in his stead, and, in case of his refusal to do so, should incur such penalties as in the Act provided ; and fees, payable out of the poor rate, were to be allowed to the constables for the service of summonses and the execution of warrants, and for such other occasional services as the justices might think fit, according to a Table to be settled at quarter sessions, and approved by a secretary of state. Every constable appointed under the Act was, moreover, to have within his county, and also within all liberties and franchises, and detached parts of other counties situated therein, and also in every adjoining county, all the powers and privileges, and be liable to all the duties and responsibilities, which a constable before enjoyed, or was subject to, within his own constablewick, but was not to be bound to act beyond his own parish without the special warrant of a justice of the peace. But since the subsequent establishment of an efficient county police has made the statute a dead letter, it has been provided, by the Parish Constables Act, 1872, that no parish constables shall be appointed, unless for any parish in regard to which the magistrates for the county in quarter sessions determine that it is necessary ; but (s. 4) *paid* parish constables may (on a resolution of the parish council, or meeting,) still be appointed in any parish not wholly or in part included in a borough.

With regard to *incorporated boroughs*, which, as above observed, are exempted from the operation of the Parish Constables Act, 1842, a police or constabulary force is

(*y*) Parish Constables Act, 1850, s. 4; *R.* v. *Booth* (1848), 12 Q. B. 884.

maintained in each for the preservation of the peace. This force is appointed by, and is under the superintendence of, the *watch committee* of the borough (*z*); but as regards boroughs, not being county boroughs, which according to the census of 1881 had a population of less than 10,000, the powers and duties of the watch committee have now ceased, and have been transferred to the council of the administrative county which comprises such borough (*a*).

In addition to the parochial and borough police, there are also the *county constabulary*, under the superintendence of a *chief constable*, an officer formerly appointed by the justices of each county subject to the approval of the secretary of state for the home department, but now, in common with the county police, subject to the standing joint committee of the quarter sessions and of the county council (*b*). The Acts relating to the county police are the County Police Acts, 1839 and 1840; the County Rates Act, 1844; the County and Borough Police Act, 1856; the County Police Act, 1857; the County and Borough Police Act, 1859; the Local Government Act, 1888; and the Police Act, 1890. The earlier Act of 1839 was permissive; but in 1856 every county was required to establish such a force (*c*). Under the provisions of these Acts the chief constable may, subject to the prescribed approbation, appoint such other constables as may be required, and also a superintendent to be at the head of the constables in each division; and may at his pleasure dismiss any of them, subject to the rules established for the government of the force (*d*).

(*z*) See the Municipal Corporations Act, 1882, repealing and re-enacting the provisions in that behalf contained in 5 & 6 Will. 4 (1835), c. 76; and (as to the watch rate) 7 Will. 4 & 1 Vict. (1837), c. 81, s. 3; 3 & 4 Vict. (1840), c. 28; and County and Borough Police Act, 1859, s. 5.

(*a*) Local Government Act, 1888, s. 39.

(*b*) *Ibid.* s. 9.

(*c*) County and Borough Police Act, 1856, s. 1.

(*d*) County Police Act, 1839, ss. 6, 7.

The same Acts further provide, that the salaries and allowances of the chief and other constables, and all expenses incurred in putting the Acts into execution, shall be paid out of a police rate to be made by the joint committee of the county council and the quarter sessions; that it shall be lawful for the justices of any county, and for the council of any incorporated borough situated in or adjoining to such county, to agree together for the consolidation of the county and borough police establishments (*e*); and that the justices of every county, and the watch committee, if any, of each borough, or where none exists, then the county council, shall annually transmit to the secretary of state an account of the crime within such county or borough respectively. And in particular, by the County and Borough Police Act, 1856, it was provided, that her Majesty might appoint *inspectors* to report on the efficiency of the police (*f*); and that on a certificate of the secretary of state that the police of any county, or of any borough, with a population amounting to five thousand, had been maintained, during the preceding year, in a state of efficiency as to numbers and discipline, a sum, in aid of its expenses, might be granted by the Treasury, not exceeding one-fourth of the charge, for its pay and clothing (*g*). It has now been provided, however, by the Local Government Act, 1888, that the proceeds of duties on local taxation licences (sect. 20) and four-fifths of one half of the probate duties (sect. 21) shall be paid over by the Exchequer to the local taxation account created by that Act, and that out of such moneys certain ascertained proportions shall be payable to each county council (sect. 22), and to the council of each county borough (s. 34), in lieu of the grants theretofore made out of the exchequer in aid of local rates. And the same Act (s. 24) provides that the county council shall, unless

(*e*) County Police Act, 1840, s. 14; Local Government Act, 1888, ss. 33, 39.

(*f*) County and Borough Police Act, 1856, ss. 14, 15.

(*g*) Sects. 16. 17.

the certificate of the efficiency of the police force is withheld, pay over or transfer to the police account of the county, or to the council of each county borough, one half of the costs of the pay and clothing of the police force of the county or county borough respectively.

There are also *special* constables, who are appointed by the magistrates to execute warrants on particular occasions, or to act in aid of the preservation of the peace on special emergencies, where an increase of the existing police force appears desirable (*h*). This office, in the absence of volunteers, is compulsory, the Special Constables Acts, 1831 and 1835, having enacted, that any two justices, upon due cause shown on the oath of a credible witness, that a tumult or riot has taken place, or may be reasonably apprehended, may, if of opinion that the ordinary officers are insufficient, appoint and swear in any persons fit for the purpose (who need not be householders, or even residents within the place for which they are to act, but must be such as have no legal exemption or incapacity from serving the office of constable) to act as special constables for a limited time, for some particular parish, township, or place. In like manner, the lord lieutenant of the county may, by direction of the secretary of state, cause special constables to be appointed to act either for the whole county, or in any portion thereof. In either case, any privilege of exemption may, by order of the secretary of state, be disallowed ; and when special constables are appointed under these Acts, they have, in general, all the same powers as an ordinary constable (*i*).

Another branch of the police of the realm, closely connected with the subject under discussion, consists of

(*h*) Constables Expenses Act, 1801.

(*i*) Special Constables Acts, 1831, s. 13 ; and 1838 ; *R.* v. *Hamilton* (1868), L. R. 3 Q. B. 718 ; *R.* v. *Lord Newborough* (1869), *ib.* 4 Q. B. 585 ; and (as to special constables in *boroughs*) see 5 & 6 Will. 4 (1835), c. 76, s. 83, repealed and re-enacted by the Municipal Corporations Act, 1882, s. 196 ; *R.* v. *Cheshire Lines Committee* (1873), L. R. 8 Q. B. 344.

watchmen, or guardians of the peace by night. These were formerly only the deputies or assistants of the constable, and were appointed by him (*k*); but in modern times, they have been appointed without the constable's intervention, being employed and paid by particular parishes, or sometimes by private individuals, with the view of obtaining (under special circumstances or on particular occasions) a more effectual protection to person and property than can be otherwise afforded. The authority of watchmen, in this modern sense, is recognized by law (*l*), —*e.g.*, by the Lighting and Watching Act, 1833, regulations were made for the watching and lighting of any parish desirous of adopting the provisions of the Act at its own expense (*m*). Yet, since it is not intended that a body of watchmen thus established shall remain as a separate force *in addition* to the county constabulary, where this latter body is sufficient for the protection of the public, by the County Police Act, 1840, s. 20, they are, as a separate force, to be discontinued on its being notified to their inspector by the chief constable of the county, that he is ready to take the charge of the place upon himself; but (by the County and Borough Police Act, 1856, s. 19) where the population of the place amounts to fifteen thousand, the previous authority of a secretary of state is also required for the discontinuance.

Finally, it may be mentioned, that, by a long series of statutes, commencing with the year 1829 (*n*), a numerous and well equipped police force has been instituted and maintained for the metropolitan area, outside the ancient boundaries of the city; and that, in the city itself, there is also a force of the City Police, under the control of the corporation (*o*).

(*k*) 1 Bl. Com. 357.

(*l*) 2 Hale, P. C. 98; 3 Inst. 52; 9 Rep. 66.

(*m*) *Pilkington* v. *Riley* (1849), 6 D. & L. 628; *R.* v. *Deverell* (1854), 3 El. & Bl. 372; *R.* v. *Overseers of Kings-Winford*, *ibid.*, 688.

(*n*) See p. 615, note (*o*), *supra*.

(*o*) 2 & 3 Vict. (1839) c. xciv.

BOOK IV.

OF PUBLIC RIGHTS—(continued).

PART II.

OF THE CHURCH.

HAVING now finished our examination of the division of public rights which concerns the *civil* authority, and the relations between persons who are subject to that authority, we are next to turn our attention to the division of public rights which concerns the *Church*, that is to say, relations and matters *ecclesiastical*.

The Church, on its legal side, may be defined as an institution established by the law of the land for the maintenance of religion ; and in treating of it, we shall find it convenient to consider,

First, THE AUTHORITIES ESTABLISHED IN THE CHURCH ;

Secondly, THE LAW RELATING TO THE DOCTRINES, WORSHIP, AND DISCIPLINE OF THE CHURCH ;

Thirdly, THE LAW RELATING TO ITS BENEFICES AND ENDOWMENTS ; AND,

Fourthly, THE EXTENSIONS OF THE ORIGINAL ESTABLISHMENT, WHICH HAVE FROM TIME TO TIME BEEN EFFECTED BY COMPARATIVELY RECENT ACTS OF PARLIAMENT.

And, first, of the Authorities of the Church, or the *Ecclesiastical Authorities*.

CHAPTER I.

OF THE ECCLESIASTICAL AUTHORITIES.

THE CLERGY and the LAITY together constitute the Church. The clergy, as distinguished from the laity, are those set apart to superintend the public worship of Almighty God (including the celebration of the sacraments and of other the ceremonies of religion), and to administer spiritual counsel and instruction. They consist of such, and such only, as have been admitted into *holy orders*, that is to say, bishops (including archbishops), priests, and deacons (*a*). By the Clergy Ordination Act, 1804, it is provided (in accordance with the canons and the rubric prefixed to the office of ordination in the Book of Common Prayer), that none shall be ordained deacon under twenty-three years, nor priest under twenty-four years of age; though the Archbishop of Canterbury has the privilege of admitting deacons (by faculty or dispensation) at an earlier age, but not priests. By the 13 Eliz. (1571), c. 12, it was further prescribed, that none should be ordained either priest or deacon, without first subscribing the Thirty-nine Articles of religion; but in lieu of this, it has now been provided, by the Clerical Subscription Act, 1865, that before ordination the priest or deacon shall make and subscribe a

(*a*) "Bishops, Priests, and "Deacons are the ministerial "orders known to the episcopal "establishment of England. In "the *Bishop*, lies the power of "ordination. *Deacons*, when or- "dained, may, licensed by the "bishop, preach and administer "the rite of baptism. *Priests*, "by this ceremony, are further "empowered to administer the "Lord's Supper, and to hold a "benefice with cure of souls."—Report on the Religious Worship of England and Wales, Dec. 1853, p. xxxiv.

declaration of *assent* to the Thirty-nine Articles, the Book of Common Prayer, and the Ordination Service, a declaration which includes also (1) an assertion of belief, that the doctrine of the Church as set forth in the Book of Common Prayer is agreeable to the Word of God ; and (2) a pledge to use in public worship and in the administration of the sacraments (*b*) the forms thereby prescribed "and none other, except so far as shall be ordered by lawful authority." It is also requisite that the candidate shall, prior to ordination, take the oath of allegiance to the King (*c*), and the oath of canonical obedience to his bishop (*d*). Moreover, by the canon law, no person may be admitted into holy orders without a *title*,—that is to say, he must produce to the bishop a presentation to some ecclesiastical living within the diocese, or a certificate that he is provided with a church or a place as minister then vacant ; it will be sufficient, however, if he be a fellow or chaplain in Oxford or Cambridge, or master of arts of five years' standing in either of such universities, and living there at his own charge, or if the bishop himself intends shortly to admit him to some benefice or curacy (*e*). If the bishop ordains a man without a proper title, he is liable himself to maintain him.

The Church of England recognizes the episcopal orders of the following foreign churches, viz., the Greek and Roman churches, and probably also the Armenian and other Eastern churches, the American Episcopal, the Swedish Church, and the Old Catholics. But by the Colonial Clergy Act, 1874, no person ordained priest or deacon by any bishop, other than a bishop of a diocese in the churches of England or Ireland, may officiate in England unless either (i) he has written permission from the Archbishop of York or Canterbury, and has subscribed

(*b*) Clerical Subscription Act, 1865, ss. 1, 4.

(*c*) The form of oath is now that prescribed by the Promissory Oaths Act, 1868, s. 14.

(*d*) Clerical Subscription Act, 1865, s. 12 ; Promissory Oaths Act, 1868, s. 14.

(*e*) Can. 33 of 1603 ; Wats. C. L. 147.

the material portion of the declaration contained in the Clerical Subscription Act, 1865, or else (ii) he has previously held preferment or a curacy in England. The consent of the bishop of the diocese is also necessary (s. 4); and any appointments made contrary to the Act are void.

In order to enable them to attend the more closely to their duties, the clergy of the established church have certain privileges and exemptions, principally the following:—A clergyman cannot be compelled to serve on a jury; nor can he be chosen to any temporal office, as bailiff, reeve, constable, or the like (*f*); and during his attendance on divine service, that is to say, *eundo*, *morando*, *et redeundo*, he is privileged from being arrested in any civil suit, and the glebe and tithes of his parsonage are not liable to be seized in execution to satisfy a judgment in the same manner as lay property, but instead are made liable to a *sequestration* (*g*). Upon a sequestration, a writ of *fieri facias de bonis ecclesiasticis* is directed to the bishop, to levy the amount of the judgment debt out of the clergyman's ecclesiastical property, and the bishop appoints a sequestrator. Under the Sequestration Act, 1871, the bishop may, on a sequestration, after six months, appoint a curate to the benefice, and assign him a stipend in proportion to the population, and the sequestrator must pay this stipend in priority to any other claim; and the bishop may also, in his discretion, inhibit the incumbent from performing any service in the church while the sequestration remains in force. Upon the bankruptcy of a beneficed clerk, the profits of his benefice are sequestered in like manner (*h*), but in every case, due provision must be made for the service of the church. Since 2 & 3 Edw. VI. (1548) c. 21, it has been lawful for the English clergy to marry.

As the clergy have their privileges, so also they have

(*f*) Finch. *Common Law*, ed. 1759, p. 388.

(*g*) Phillimore, *Ecclesiastical Law*, ed. 1895, p. 1074; *Arbuckle* v. *Cowtan* (1803), 3 Bos. & Pul. 326; *Powell* v. *Hibbert* (1850), 15 Q. B. 129.

(*h*) Bankruptcy Act, 1883, s. 52.

their disabilities. By the House of Commons (Clergy Disqualification) Act, 1801, they are made incapable of being elected members of the House of Commons; and by the Municipal Corporations Act, 1882, s. 12, of being councillors or aldermen in boroughs. They are also prohibited from farming or trading; for, by the Pluralities Act, 1838, ss. 28—30, (repealing some former enactments on this subject,) no spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, may take to farm for occupation by himself any lands exceeding eighty acres in the whole, without permission in writing from the bishop of the diocese; nor may such spiritual person, by himself or any other to his use, carry on any trade or dealing for profit, unless it be carried on by more than six partners, or unless his share in it shall have devolved to him by inheritance, or other like representative title. And, even in these excepted cases, it is illegal for him to act as director or managing partner, or to carry on the trade in person (*i*). But, notwithstanding these prohibitions, a contract made by any spiritual person is, in general, enforceable against him (*k*); and the Act allows him to carry on the business of a schoolmaster, to deal with booksellers as to the sale of books, to be a managing director, partner, or shareholder in any benefit, fire insurance, or life insurance society, to buy or sell to the extent necessarily incidental to his lawful occupation of glebe and other land, and to sell minerals, the produce of his land,—provided always that none of such transactions be personally conducted by him in any market or place of public sale.

The divers ranks and degrees of the clergy, as recognized by the law of England, are the following, namely;—archbishops and bishops; deans and canons; archdeacons and rural deans; rectors, vicars, and curates; and parish clerks and sextons.

(*i*) Section 29; and Trading Partnership Act, 1841.

(*k*) *Lewis* v. *Bright* (1855), 4 El. & Bl. 917.

I. Both ARCHBISHOPS and BISHOPS are constituted by election, confirmation, consecration, and installation; though an archbishop is more properly said to be *enthroned* and not installed (*l*). [Their election is by the chapter of the cathedral church, but only in virtue of a licence from the Crown; for although, in very early times, election proper, *per clerum et populum*, was the usual mode of elevation to the episcopal chair (*m*), yet the right of appointing to bishoprics, already in Saxon times, was in effect in the Crown (*n*), the investiture (which was originally *per annulum et baculum*, and subsequently *per sceptrum*) (*o*), operating as a complete donation.

Subsequently, however, King John, in order to obtain the protection of the pope against his discontented barons, was prevailed upon to give up, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops; and he reserved only the custody of the temporalities during the vacancy, the form of granting a licence to elect (on refusal whereof the electors might proceed without it), and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause (*p*). But, by the Act of Annates, in 1534 (*q*), the right of nomination, as it exists at the present day, was restored to and re-vested in the Crown. For by that statute, it was enacted, that on any future avoidance of an archbishopric or bishopric, the king may send the dean and chapter his usual licence (called his *congé d'élire*) to proceed to election; which is always

(*l*) *Bishop of St. David's* v. *Lucy* (1699), 1 Salk. 134; 3 Salk. 72.

(*m*) *Bishop of Ossory's Case* (1620), Palmer's Reports, p. 28; *Solrean* v. *Keran*, 2 Rolle's Reports (1620), 101; M. Paris, A.D. 1095, p. 95.

(*n*) Palmer's Reports, 28; Selden, *Jan. Ang.* l. 1, s. 39.

(*o*) Decret. 2, caus. 16, qu. 7, ch. 12 *et* 13; Encyclop. Britt. sub. tit. *Investiture*.

(*p*) M. Paris, A.D. 1214, p. 247; 1 Rym. Fœd. 198; Magna Carta, c. 1; 25 Edw. III. (1352), st. 6, c. 3.

(*q*) Revived by 1 Eliz. (1558) c. 1, s. 7. (The Act of Supremacy.)

[to be accompanied with a letter missive from the King, containing the name of the person whom he would have them elect. And if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may then by letters-patent appoint such person as he pleases; and this *congé d'élire* issues also (*r*) in the case of the bishoprics created by Henry VIII. himself, viz., Chester, Gloucester, Peterborough, Bristol, and Oxford, although these are in a sense donative (*s*), that is, in the gift of the Crown.

This election or nomination, if it be of a bishop, must be signified by the king's letters-patent to the archbishop of the province; and if it be of an archbishop, to the other archbishop and two bishops, or to four bishops. In either case, it requires them to confirm, invest, and consecrate the person so elected, which they are bound forthwith to perform (*t*); after which, the bishop elect sues to the king for his temporalities, making oath to the king and none other, and takes restitution of his secular possessions out of the king's hands only. And if the dean and chapter do not elect in the manner by the Act appointed, or if the archbishop or bishop refuse to confirm, invest, and consecrate the bishop elect, they incur the penalties of a *præmunire*, that is to say, the loss of all civil rights, with forfeiture of lands, goods, and chattels, and imprisonment during the royal pleasure.]

There are two archbishops for England and Wales (*u*); that is to say, the Archbishop of Canterbury, who has

(*r*) *R.* v. *Archbishop of Canterbury* (1848), 11 Q. B. 513.

(*s*) Co. Litt. by Harg. 134 a, n. (*s*).

(*t*) *Rex* v. *Archbishop of Canterbury*, [1902] 2 K. B. 503. A bishop, when consecrated, must be full thirty years of age (see the rubric prefixed to the office of ordination in the Book of Common Prayer); but anciently there seems to have been no such restriction. (See Godw. *Comm. de Præsul.* 693.)

(*u*) At one time there were *three* archbishoprics, the third being that of Cærleon in Wales; but in the time of Henry the First, both that see and all Wales became subject to the Archbishop of Canterbury. (Rogers, *Eccl. Law*, 105.)

within his province all the bishoprics, except those of Chester, Durham, Carlisle, Ripon, Manchester, Liverpool, Newcastle, Sodor and Man, Wakefield, and the bishopric of York; and the Archbishop of York, whose province comprises the ten bishoprics just named. [An archbishop is, indeed, the chief of all the clergy in his province; and has the inspection of the bishops of that province as well as of the inferior clergy, or (as the law expresses it) the power to *visit* them (*x*). Therefore, he confirms the election of the bishops, and afterwards consecrates them (*y*); and upon receipt of the king's writ, he calls the bishops and clergy of his province to meet him in convocation, but, without the king's writ, he cannot assemble them (*z*). To him, all appeals in ecclesiastical matters are made from the inferior ecclesiastical jurisdictions within his province; and as an appeal lies from the bishops in person to him in person (*a*), so it also lies from the consistory courts of each diocese to the archiepiscopal court (*b*). During the vacancy of any see in his province, the archbishop is guardian of the spiritualities thereof, as the king is of the temporalities, and he executes all ecclesiastical jurisdiction therein; but if an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of Prior of Canterbury was abolished at the Reformation (*c*). The archbishop is entitled to present by lapse, to any ecclesiastical living in the disposal of one of his diocesan bishops, if not filled within six months; and he has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such bishop (*d*), in lieu of which, the

(*x*) *Bishop of St. David's* v. *Lucy* (1699), 1 Salk. 134; *Re Dean of York* (1841), 2 Q. B. 1.

(*y*) 2 Roll. Abr. 223.

(*z*) 4 Inst. 322, 323.

(*a*) *Read* v. *The Bishop of Lincoln* (1889), 14 P. D. 88.

(*b*) *Ex parte Denison* (1854), 4 El. & Bl. 292; *R.* v. *Tristram*, [1902] 1 K. B. 816.

(*c*) 2 Roll. Abr. 223.

(*d*) Bishops are styled *suffragan* (a word signifying *deputy*), in respect of their relation to the archbishops of their province. But at one time bishops also had

[bishop used to make over by deed to the archbishop, the next presentation of such dignity or benefice in the bishop's disposal, within the see, as the archbishop himself should choose, which, therefore, was called his *option*, and was binding on the bishop himself alone who granted the option, and not on his successors (*e*).

It is also the privilege of the Archbishop of Canterbury to crown the kings and queens of this kingdom (*f*); and he has also, by the statute 25 Hen. VIII. (1534), c. 21 (*g*), the power of granting *dispensations* in any case, not contrary to the Holy Scriptures or to the law of God, where the pope used formerly to grant them. This is the foundation of his power to grant special licences to marry at any place or time (*h*), and to give dispensations to hold two livings (*i*), and the like; and on this also is founded

their suffragans to assist them in conferring orders, and in other spiritual offices within their diocese; and, after having for a long period remained in abeyance, these suffragan bishops have recently been again brought into use in some of the dioceses. But such suffragan bishops must not be confounded with the *coadjutors* of bishops, the latter being appointed (in the case of a bishop's infirmity) to superintend his *jurisdiction* and *temporalities*, neither of which is within the interference of the former (1 Gibs. *Cod.* 2nd edit. 137; Co. Litt. by Harg. 94 a, n. (3)). As to the election and consecration of suffragan bishops, see 26 Hen. 8 (1534), c. 14, amended by the Suffragans Nomination Act, 1888, and by the Suffragan Bishops Act, 1898.

(*e*) The king, in imitation of the Emperor of Germany, exercised (or claimed to exercise) the right of naming to the first prebend that became vacant after his accession (Brev. 11 Edw. 1; 3 Pryn. 1264); and this prerogative probably gave rise to *corodies*, viz., the right (now disused) of the king to send one of the royal chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promoted him to a benefice.

(*f*) It is said, that the Archbishop of York has the privilege to crown the queen consort, and also to be her perpetual chaplain. (1 Burn, *Eccl. Law*, 198.) At the coronation of King Edw. 7 this privilege of the Archbishop of York was allowed, but not as of right.

(*g*) See also 28 Hen. 8 (1536), c. 16; *Colt* v. *Bishop of Lichfield* (1613), Hob. 140 b.

(*h*) Marriage Act, 1823, s. 20.

(*i*) Pluralities Act, 1838, s. 6; and 1850.

[the right he exercises of conferring degrees (called Lambeth degrees), which are quite distinct from degrees given by the universities (*k*)].

A bishop is the chief of the clergy within his diocese, being subordinate to the archbishop of the province, to whom indeed he is sworn to pay due obedience (*l*) ; and his dignity is usually called a see (*sedes*), and the church of his diocese a *cathedral*. A *collegiate church* (*m*), which is a church consisting of a body corporate of dean and canons, such as Westminster, Windsor, &c., differs from a cathedral (*n*) in that it is not the church of a bishop.

[Among the principal powers which the bishop exercises, are those of ordaining priests and deacons (whether for England and Wales or for the colonies or foreign countries generally) (*o*), consecrating churches, and inspecting the manners of the clergy (*p*) ; for which purpose, he may *visit* at pleasure every part of his diocese. It is likewise part of his business to institute and direct induction to all livings in his diocese, to license to perpetual curacies (*q*), and to license temporary curates within the diocese and to regulate their salaries. In addition to these functions, the bishop is also an ecclesiastical judge ; but his chancellor (who must be a bachelor

(*k*) *Bishop of Chester's Case*, Oxon. 1721.

(*l*) A clergyman owes "*canonical obedience*" to the bishop who ordained him, to the bishop in whose diocese he is beneficed, and also to the metropolitan of such bishop, so that to kill any of these was petit treason (1 Hale P. C. 381).

(*m*) Ecclesiastical Commissioners Acts, 1840 and 1841 ; Cathedrals Act, 1864.

(*n*) There are thirteen *cathedrals of the old foundation ; eight conventual cathedrals, constituted with deans and chapters* by Hen. 8 ; *five cathedrals founded, together with new bishoprics*, by Hen. 8 ; besides the modern cathedrals of Ripon, Manchester, Liverpool, Wakefield, &c.

(*o*) Ordinations for Colonies Act, 1819 ; Colonial Bishops Act, 1852 ; Episcopal Church (Scotland) Act. 1864 ; Colonial Clergy Act, 1874.

(*p*) *Re Dean of York* (1841), 2 Q. B. 1.

(*q*) Pluralities Act, 1838, s. 77.

[of laws or a master of arts) is appointed to hold his consistory courts for him, and to assist him in matters of ecclesiastical law (*r*). If, however, the bishop's commission to his chancellor requires the consent of the bishop for the hearing in any particular case, prohibition will issue if that consent is not first obtained (*s*).

In case of complaint against a clerk in holy orders, for any ecclesiastical offence involving immorality (and not being a mere question of doctrine or of ritual) (*t*), proceedings may be taken under the Clergy Discipline Act, 1892, which repeals, but re-enacts with amendments, the like provisions contained in the Church Discipline Act, 1840. By the provisions of the Clergy Discipline Act, 1892, ss. 2—10, the offender may be prosecuted in the consistory court of the diocese in which he holds preferment (*u*), and at the suit either of the bishop (*v*) (or of anyone approved by him), or of any of the parishioners of the parish. The bishop has a discretion to veto the prosecution in any case in which he thinks the complaint to be either vague or frivolous (*x*); but if the prosecution proceeds, then (for the decision of any question of fact that may be in dispute) five assessors are to be chosen upon the request of either party, and for the decision of the question

(*r*) Canons of 1603; Godolph. Ab. 82, Hen. 8.

(*s*) *Rex* v. *Tristram*, [1902] 1 K. B. 816.

(*t*) *Simpson* v. *Flamank*, L. R. (1867), 1 P. C. 463; *Rugy* v. *Bishop of Winchester*, *ib.* (1868), 2 P. C. 223; *Martin* v. *Mackonochie* (1883), 8 P. D. 191.

(*u*) *Lee* v. *Flack*, [1896] P. 138.

(*v*) When the bishop was the patron of the preferment held by the clerk proceeded against, the *archbishop* used to act (*Ex parte Denison* (1854), 4 El. & Bl. 292; *R.* v. *The Archbishop of Canterbury* (1856), 6 El. & Bl. 546); but the bishop is now expressly made competent in such a case to act. (Sect. 10, subsect. (3).)

(*x*) Under the Church Discipline Act, 1840, the bishop had a discretion as to whether or no he would issue a commission; but the acceptance of the *letters of request* lodging the complaint was not optional. (See *R.* v. *The Bishop of Chichester* (1859), 2 El. & El. 209; *Sheppard* v. *Phillimore and Bennett* (1869), L. R. 2 P. C. 450.)

of fact, the assessors must be unanimous, or else the chancellor of the court and a majority of the assessors must agree upon it. At the trial, the chancellor presides, and all questions of law are determined by him (sect. 2); and either party may appeal on any matter of law, either to the provincial court or to the king in council. An appeal operates in the meantime to stay the sentence (sect. 4); but no complaint is competent after five years from the date of the offence (sect. 5). In case the alleged offence is substantiated, the sentence of the court may suspend the clerk from performing divine service, and from enjoying the profits and emoluments of the living, for a specified number of years (*y*), or may absolutely deprive him (sect. 6); and if the sentence be one of deprivation, the offending clerk (unless he shall be freely pardoned by the Crown) is incapable of holding any preferment, except such as the bishop and archbishop shall (after public notice of their intention in that behalf) allow him to hold (sect. 6). He may even be deposed from holy orders by the bishop, subject to appeal to the archbishop (sect. 8 (*z*)).

Also, under the Benefices Act, 1898 (*a*), when the bishop refuses (under sect. 2) to institute a clergyman to a living on account of grave ecclesiastical misconduct or of evil living, the validity of the refusal may be determined (under sect. 3) by the archbishop and a judge, who together constitute a court of appeal for this purpose.

As regards offences against doctrine, ritual, and the like, by the Public Worship Regulation Act, 1874 (*b*), the Archbishops of Canterbury and York are empowered to appoint (subject to the approval of the Crown) a judge of the Provincial Courts, who must be a barrister of

(*y*) The profits of the living during suspension belong to the bishop, subject to his making due provision for the services. (*In re Thakeham Sequestration Moneys* (1871), L. R. 12 Eq. 494.)

(*z*) See *Bishop of Rochester* v. *Harris*, [1893] P. 137; *Sweet* v. *Young*, [1902] P. 37.

(*a*) 61 & 62 Vict c. 48; and Benefices Rules, 1899.

(*b*) 37 & 38 Vict. c. 85.

ten years' standing, or one who has been a judge of the superior courts, and in either case a member of the Church of England; and, on a vacancy occurring, as happened prior to 1903, in the offices of official Principal of the Arches Court of Canterbury and of the Chancery Court of York the judge was to become the holder of both these offices (*c*). The Act requires such judge to entertain and determine complaints in regard to alterations in the fabric or ornaments or furniture of any church, or in respect of the burial ground, or of the manner in which the ritual prescribed in the Book of Common Prayer is observed; but he can only act on being required (by way of special case transmitted to him by the bishop at the request of the parties) to decide the matter in dispute. And the bishop only transmits such case, if he has received a "representation" as to the matter complained of from the archdeacon, or churchwardens, or any three parishioners, or (in the case of a cathedral or collegiate church) from any three inhabitants of the diocese, being male persons of full age; and then only if, after considering the whole circumstances, he is of opinion that proceedings should be taken on such representation, and if the parties to such representation are not willing to submit, without appeal, to the bishop's own decision in the matter (*d*). There is also concurrent jurisdiction to try ritual offences under the Church Discipline Act, 1840.

[Archbishoprics and bishoprics may become void by deprivation, for any very gross and notorious crime, and also by resignation; and as all resignations must be made to some superior, a bishop resigns to his metropolitan, and the archbishop to the Crown (*e*).] Under the provi-

(*c*) Mr. Lewis Tonna Dibdin, K.C., was in May, 1903, made judge under the Act of 1874, and also official Principal of the Arches Court of Canterbury and of the Chancery Court of York.

(*d*) *Hudson* v. *Tooth* (1877), 3 Q. B. D. 46; *Dale's Case* (1882), L. R. 7 App. Ca. 240; *Ex parte Green* (1881), 6 App. Ca. 657; *Dean* v. *Green* (1882), 8 P. D. 79.

(*e*) Gibs. *Cod.* 822.

sions of the Bishops Resignation Act, 1869 (made perpetual by the 38 & 39 Vict. c. 19), an archbishop or bishop may resign on the ground of age, or mental or permanent physical infirmity, and receive a retiring income charged upon the episcopal revenues; or the dean and chapter may elect a *bishop coadjutor* in aid of the bishop in such a case.

The claims of the Crown on archbishoprics and bishoprics in respect of the custody of the temporalities, and in respect of the first fruits and tenths of all spiritual preferments, have been already noticed, and need not, therefore, be again discussed (*f*); but we may mention here, that the Crown was at one time entitled on the death of a bishop to divers small perquisites in the nature of a *mortuary* (or fine on death) (*g*), and that when any spiritual person is made an English bishop, the preferments of which he was before possessed become, in general, void upon his consecration, and the Crown may present to them by prerogative (*h*). But this prerogative does not extend to appointments to colonial bishoprics (*i*), nor to foreign bishoprics of the English Church (*k*).

II. [A DEAN and CHAPTER are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see (*l*): and the bishop is the immediate superior and ordinary of the

(*f*) See *ante*, pp. 524, 525.

(*g*) The mortuary (or fine on death) comprised six things, viz., the bishop's best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cup and cover; his bason and cover; his gold ring; and, lastly, his *muta canum, i.e.*, his mew or kennel of hounds. (See 2 Inst. 491; 2 Bl. Com. 426; *Mirehouse* v. *Rennell* (1832), 8 Bing. 497.)

(*h*) *Basset* v. *Gee* (1600), Cro. Eliz. 790; *Grocers' Company* v. *Archbishop of Canterbury* (1771), 2 W. B. 770.

(*i*) *R.* v. *Eton College* (1857), 8 El. & Bl. 610.

(*k*) Bishops in Foreign Countries Act, 1841.

(*l*) *Dean and Chapter of Norwich's Case* (1598), 3 Rep. 73; Co. Litt. 103, 300.

[dean and chapter, and exercises over them the power of *visitation* (*m*). The chapter, as distinct from the dean, consist of certain dignitaries called canons; and those of them who hold *prebends* are also called prebendaries (*n*). They are sometimes appointed by the Crown, sometimes by the bishop, and sometimes by each other (*o*). At one period the dean was elected by the chapter, on a *congé d'élire* from the Crown, in the same manner as bishops; but in those deaneries which were founded by Henry the Eighth, out of the spoils of the dissolved monasteries, the title has always been donative, and the installation merely by letters-patent from the Crown (*p*).] And this is now the course with respect to the antient deaneries also, it having been provided by the Ecclesiastical Commissioners Act, 1840, that from the date of that Act every deanery (except in Wales) should be in the direct patronage of her Majesty. By the same Act, it was also provided, that no person should thereafter be capable of receiving the appointment either of dean, archdeacon, or canon, until he should have been six years complete in priest's orders, except in the case of a canonry annexed to any professorship, headship, or other office in some university (*q*); and, further, that every dean should reside for at least eight months in the year (*r*), that the term of a canon's residence should be at least three months in the year (*s*), that the right of nominating a regulated number of *minor* canons, with salaries, should in future be in all cases vested in the respective chapters (*t*), and that *honorary* canons, without salaries, should be appointed for every cathedral church in which there were not already founded any non-residentiary prebends,

(*m*) *Re Dean of York* (1841), 2 Q. B. 1.

(*n*) Ecclesiastical Commissioners Act, 1840, s. 1.

(*o*) *Ibid.* ss. 24, 26; and Act of 1841.

(*p*) Co. Litt. 95.

(*q*) Ecclesiastical Commissioners Act, 1840, s. 27.

(*r*) Sect. 3.

(*s*) *Ibid.*

(*t*) Sect. 45.

dignities, and offices, which honorary canonries are in the gift of the archbishops and bishops respectively. Since this Act, non-residentiary prebendaries have ceased to be members of the chapter (*u*).

Deaneries and canonries may become void by deprivation; or by resignation either to the king or to the bishop (*x*). Under the provisions of the Deans and Canons Resignation Act, 1872, s. 3, a dean or canon may resign on the ground of age or infirmity, and receive a pension, not exceeding one-third of the value of his living, charged upon the living.

III. [An ARCHDEACON hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, either throughout the whole of the diocese or in some particular part of it. He is usually appointed by the bishop himself; and has a kind of episcopal authority, originally derived from the bishop, but now independent and distinct (*y*). He therefore *visits* the clergy; and he has his separate court for the punishment of offenders by spiritual censures, and for hearing other causes of ecclesiastical cognizance.] All archdeacons throughout England and Wales now exercise full and equal jurisdiction within their respective archdeaconries (*z*); and, as a general rule, the jurisdictions of the archdeacon and the bishop are *concurrent*, so that a suit may be commenced in the court of either (*a*).

IV. [The RURAL DEANS are very antient officers of the church (*b*), whose functions at one time threatened to go out of use; but rural deaneries still subsist as an ecclesiastical division of the diocese, or of the arch-

(*u*) *Randolph* v. *Milman* (1866), L. R. 2 C. P. 60.

(*x*) *Grendon* v. *Bishop of Lincoln* (1576), Plowd. 498.

(*y*) 1 Burn, *Eccl. Law*, 93.

(*z*) Ecclesiastical Commissioners Act, 1833, s. 19.

(*a*) Rogers, *Eccl. Law*, 60.

(*b*) Kennett, *Par. Antiq.* 633. Dansey, *Horæ Decanicæ Rurales.*

[deaconry (*c*)]; and of late years the office has somewhat revived in importance. [They seem originally to have been deputies of the bishop, planted all over his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation; and they were armed, in minuter matters, with an inferior degree of judicial and coercive authority (*d*).

V. The next (and indeed the most numerous) order of ecclesiastical persons are the RECTORS and VICARS of churches.

1. The *rector* of a church is also properly called a "parson," *persona ecclesiæ*, that is, one that hath full possession of all the rights of a parochial church (*e*). He is called *parson*, because by his person the church, which is an invisible body, is represented; and this appellation is the most legal, most beneficial, and most honourable title that a parish priest can enjoy, because such a one, (Sir Edward Coke observes,) and he only, is said *vicem seu personam ecclesiæ gerere*. The freehold of the parsonage house, the glebe, the tithes, and other dues, all vest, during his life, in the parson. But here we must explain the doctrine of appropriations, and the consequent distinction between *rectors* and *vicars*.

At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division,—one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. But when the sees of the bishops became otherwise amply endowed, they were

(*c*) Ecclesiastical Commissioners Acts, 1836 and 1840; Archdeaconries and Rural Deaneries Act, 1874.

(*d*) Gibs. *Cod.* 972, 1550; and see Second Report of Royal Commission on Local Taxation, 1899.

(*e*) The proper term for a parson in full possession of his living is, in law, *persona impersonata*, or parson imparsonee. (See Co. Litt. 300 b.)

[deprived of their share of these tithes ; and when any advowsons were subsequently acquired by the monasteries, they *appropriated* to the use of their own corporations the benefices so acquired, together with all the endowments thereof, save only a small part, which they deemed sufficient for the officiating priest (*f*). And upon such an appropriation, the appropriators and their successors became the rectors, or perpetual *parsons*, of the church, so as to sue and be sued in all matters concerning the rights of the church, by the name of parsons (*g*). And when, by the Acts of 1535 and 1539, the monasteries were dissolved, the appropriations which belonged to them respectively,—amounting (it has been said) to more than one-third of all the parishes in England,—were given to the king in as ample a manner as the appropriators held the same at the time of their dissolution ; and many of the appropriations so vested in the Crown by the effect of these several dissolutions, being afterwards from time to time granted out by the Crown to subjects, are now in the hands of lay persons, who are usually styled, by way of distinction, *lay impropriators*, though the term *appropriators* is, in strictness, as applicable to these as to the original holders (*h*).

Appropriations (whether spiritual or lay) are capable of being severed, so that the church may become disappropriate. For if the appropriator presents a clerk, who is instituted and inducted to the *rectory*, that incumbent so instituted and inducted is to all intents and purposes a complete parson : and the appropriation, being once severed, can never be reunited again, unless by a repetition of the same solemnities (*i*).]

(*f*) *Grendon* v. *Bishop of Lincoln* (1576), Plowd. 496—500.

(*g*) *Wright* v. *Gerard* (1618), Hob. 307 ; and see 27 Hen. 8 (1536), c 28 ; and 31 Hen. 8 (1539), c. 13.

(*h*) Burn, *Eccl. Law*, vol. i. 66 ; Spelm. *Tithes*, ch. 29.

(*i*) Co. Litt. 46 ; see also the Somersham Rectory Act, 1882 (45 & 46 Vict. c. 81), converting that rectory into a vicarage.

In lay appropriations, there is generally a spiritual person attached to the same church, under the name of *vicar*, to whom the spiritual duty, or *cure of souls* (as it is termed), belongs; and to whom a certain portion of the tithes or other emoluments of the church is assigned, by way of exception out of those enjoyed by the appropriator. The origin of vicars was as follows (*k*):—

[The appropriating corporations or religious houses were wont to depute one of their own body to perform divine service, and to adminster the sacraments; and this officiating minister, or deputy, was in reality the mere vicegerent of the appropriator, and was therefore called vicar (*vicarius*) (*l*). His stipend was at the discretion of the appropriator, who was, however, bound of common right to find somebody (*m*); but this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose. Accordingly, by the 15 Ric. II. (1391) c. 6, it was enacted, that in all appropriations of churches, the diocesan bishop should require a *competent* sum to be distributed among the poor parishioners annually, and that the vicarage should be *sufficiently* endowed; and by the 4 Hen. IV. (1402) c. 12, it was ordained, that the vicar,—who, from thenceforth, was not to be a member of any religious house,—should be a vicar perpetual, and not removable at the caprice of the monastery, and should be canonically instituted and inducted, *and be sufficiently endowed at the discretion of the ordinary, for three express purposes*, viz., to do divine service, to inform the people, and to keep hospitality (*n*). In consequence of these two statutes, the endowments of

(*k*) Y. B. 40 Edw. 3, pl. 27; *Britton* v. *Wade* (1619), Cro. Jac. 516; Spelm. *Tithes*, 153; *Bird* v. *Relph* (1835), 2 A. & E. 780; Rogers, *Eccl. Law*, 890.

(*l*) *Grendon* v. *Bishop of Lincoln* (1576), Plowd. 493.

(*m*) Seld. *Tith.* ch. 11, 1.

(*n*) From this Act (4 Hen. 4, c. 12), may be dated the origin of the *present* vicarages; before that time, the vicar was nothing more than a temporary curate, and was generally one of the *regular* clergy,

[vicarages have usually been by a portion of the glebe lands belonging to the parsonage, and by a share of the tithes, the greater part of the tithes being, however, still reserved to the use of the appropriators. But one and the same rule was not observed in the endowment of all vicarages; wherefore some are more liberally, and others more scantily, endowed. And the tithes of many things, as wood in particular, are in some parishes rectorial, and in others vicarial.]

Such is the history of the distinction between rectors and vicars; and the law on the subject may be shortly stated as follows. Of parochial churches, some have been appropriated, others have not. In a non-appropriated living, there is no vicar, but a rector only, who must be a spiritual person, and who has the cure of souls in the parish, with the exclusive title to all the emoluments (*o*). In an appropriated living, there is generally (besides the appropriator) a vicar; and in such latter cases, the appropriator never has the cure of souls within the parish, that being committed exclusively to the vicar. The emoluments of appropriated livings belong in part to the appropriator, in part to the vicar, according to the distinctions already in part referred to; and, in non-appropriated churches, the rector, and in appropriated churches, the vicar, is seised for his life only, the fee being in abeyance. But the appropriator (or tithe owner) may be entitled either in fee or for a less estate, according to the circumstances of his title (*p*).

the monks, who lived according to the rules of their respective houses, being so denominated, in contradistinction to the parochial clergy, who, as they performed their ministry in the world (*in seculo*), were called *secular* clergy.

(*o*) By the Spiritual Duties Act, 1839, reciting that there are several benefices, in which more than one spiritual person has the general cure of souls, the bishop is empowered, where such is the case, to order an appointment of the spiritual services.

(*p*) *Grendon* v. *Bishop of Lincoln* (1576), Plowd. 493; *Duke of Portland* v. *Bingham* (1792), 1 Hagg. Consist. Rep. 162.

But it is not in all appropriations that a vicar exists; for in some it happens, in consequence of their being exempted (for particular reasons) from the statute of 4 Hen. IV. (1402), c. 12, that no vicar has ever been endowed (*q*). Such churches, however, usually possess a permanent minister in holy orders, of the same general description as a vicar, who, under the denomination of *perpetual curate*, is charged with the cure of souls; and he is entitled to emolument for his services, and is liable to his successor for dilapidations (*r*), and is in most other respects situated similarly to a vicar (*s*). Owing to the growth of population in the great towns, provision has been made by a series of Church Building Acts, from 1818 to 1884, and by the New Parishes Acts, 1843 to 1884, for the creation of new parishes or districts. Of these there are several kinds—distinct and separate parishes, district parishes, district chapelries, consolidated chapelries, and Peel parishes and districts; and of many of these districts or divisions, the incumbents were originally only curates. But by the District Church Tithes Amendment Act, 1868, the incumbent of the church of every parish or new parish for ecclesiastical purposes, not being a *rector*, who is entitled to perform marriages, churchings, and baptisms, and to claim the fees thereof for his own use, shall, for the purpose of style and designation, but not for any other purpose, be deemed and styled the *vicar*, and his benefice a *vicarage* (*t*). The effect of this provision when read together with the New Parishes Act, 1856 (known as Lord Blandford's Act), is to make almost all incumbents, who are not rectors, vicars.

It is to be observed also, that in former times the rector of a benefice, having cure of souls, sometimes obtained

(*q*) 1 Burn, *Eccl. Law*, 437; Wats. C. L. 343.

(*r*) *Mason* v. *Lambert* (1848), 12 Q. B. 795.

(*s*) *Doe* v. *Thomas* (1839), 9 A. & E. 556; *Doe* d. *Brammall* v. *Collinge* (1849), 7 C. B. 939.

(*t*) Queen Anne's Bounty Act, 1714, ss. 4 and 21; and 34 & 35 Vict. (1871), c. 43, s. 3.

permission to appoint a vicar to officiate under him ; so that, by this means, two persons were instituted to the same church, and both had cure of souls. The effect of this was, that by custom the rector became at length entirely relieved from residence, and from all other spiritual duties ; whence he came to be called a *sinecure rector*, or rector without cure of souls (*u*). But by the Ecclesiastical Commissioners Act, 1840, ss. 48, 55, it was provided, that all ecclesiastical rectories without cure of souls (having vicars endowed or perpetual curates), which were in the sole patronage of the Crown or of any ecclesiastical corporation aggregate or sole, should, immediately upon the first vacancies, be entirely suppressed ; and that the patronage of all others might be at any time sold to the Ecclesiastical Commissioners, and should thereupon be also suppressed ; and that the lands, tithes, and endowments of any such suppressed sinecure rectory might be annexed (when it should appear expedient) to the vicarage or perpetual curacy, which should thereupon be constituted a rectory with cure of souls.

We have thus had occasion to speak of three several kinds of parochial preferments, viz., rectories, vicarages, and perpetual curacies ; and as to each of these we may remark, that they are usually comprehended under the general term of *benefice* (*x*), a term indeed which, in its technical sense, though not in its popular acceptation, extends not only to these, but also to any ecclesiastical preferments to which rank or public office is attached, and which are described in our books as ecclesiastical *dignities* or *offices*, such as bishoprics, deaneries, and the like (*y*). But in statutes, these latter are in general distinguished (*z*).

(*u*) 2 Burn, *Eccl. Law*, 347 ; Rogers, *Eccl. Law*, 890 ; Gibs. *Cod.* 753.

(*x*) Ecclesiastical Leases Act, 1842, s. 15 ; Ecclesiastical Leasing Act, 1842, s. 31 ; Pluralities Act, 1850, s. 3.

(*y*) 3 Inst. 174.

(*z*) Pluralities Act, 1838, s. 124—in which Act (but for the purposes

2. The methods of becoming a rector and becoming a vicar are much the same. To both there are, in general, four requisities necessary, namely,—*holy orders*, *presentation*, *institution*, and *induction*. By the 13 & 14 Car. II. (1662) c. 4, s. 14, no person is capable of being admitted to any benefice, unless he shall have been first ordained a priest; and, by s. 2 (1) (b) of the Benefices Act, 1898, the bishop may refuse to institute if, in the case of the priest presented to him, not more than three years have elapsed since he was ordained deacon.

[Any person thus qualified may be *presented* to a rectory or vicarage, that is, the patron to whom the advowson of the church belongs, may offer his nominee to the bishop of the diocese to be instituted. But, when a clerk is presented, the bishop may, upon many accounts, refuse to institute him. As (1) if the patron is excommunicated, and remains in contempt forty days (*a*). Or (2) if the clerk be unfit; which unfitness may be of several kinds. First, with regard to his person, as if he be an outlaw, an excommunicate, or an evil liver (*b*), or pecuniarily embarrassed or under age, or the like; but bastardy is no longer a ground of unfitness. Secondly, with regard to his faith or morals, as if he be charged with any particular heresy, or vice that is *malum in se*: but if the bishop objects only for a fault that is *malum prohibitum*,—as haunting taverns, playing at unlawful games, or the like, —it is not good cause of refusal (*c*). Lastly, the clerk may be unfit to discharge the pastoral office for want of learning (*d*), or (in Wales) for want of knowledge of

of the Act only), *benefices* are distinguished from *cathedral preferments; benefices* denoting all parochial or district churches, and endowed chapels and chapelries, and *cathedral preferments* denoting all deaneries, archdeaconries, and canonries, and (generally) all dignities and offices in any cathedral or collegiate church below the rank of bishop.

(*a*) 2 Roll. Abr. 355.

(*b*) Benefices Act, 1898, s. 2.

(*c*) *Specot's Case* (1590), 5 Rep. 58; *Heywood* v. *Bishop of Manchester* (1884), 12 Q. B. D. 404.

(*d*) Benefices Act, 1898, s. 2.

[Welsh (*e*). In any of these cases, the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or of language, or other matter of ecclesiastical cognizance, the bishop must give notice to the patron of such his cause of refusal (*f*), at least if the patron be a layman, for in that case he is presumably unaware of the disability; but if the objection be a temporal one, the bishop is not bound to give such notice (*g*). Under the Benefices Act, 1898 (*h*), s. 3, notice must also be given to the presentee himself; and there is an appeal to the court which is for this purpose constituted by the Act, namely, to the archbishop and a judge of the Supreme Court.

If the bishop hath no objection, but admits the patron's presentee, the clerk so admitted is next to be *instituted* by the bishop. Institution invests the clerk with the care of the souls of the parish committed to his charge; but when the bishop is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a *collation* to the benefice.] By s. 2 (2) of the Benefices Act, 1898, the bishop cannot collate, institute, or admit any person to a benefice, until one month after a notice that he intends to do so has been served on the churchwardens, and has been published by them. And before institution or (as the case may be) collation, the clerk must renew the "declaration of assent" which he made previously to his ordination, and must also make and subscribe the declaration against simony, provided in the Benefices Act, 1898. He must also take the oath of allegiance to the King (as framed by the Promissory Oaths Act, 1868), before the archbishop or bishop, or

(*e*) *Abergavenny* (*Marquis*) v. *Llandaff* (*Bishop*) (1888), 20 Q. B. D. 460.

(*f*) *Bedinfield* v. *Archbishop of Canterbury* (1570), Dyer, 292, (*b*); *Hele* v. *Bishop of Exeter* (1692), 2 Salk. 539; *Albany* v. *Bishop of St. Asaph* (1585), Cro. Eliz. 119.

(*g*) 2 Inst. 632; 2 Burn, *Eccl. Law*, 159.

(*h*) 61 & 62 Vict. c. 48.

their commissary; and he must also take the oath of canonical obedience to his bishop (*i*). [By institution or collation, the church is full, at least in the case of a common patron; but the church is not full against the Crown till induction, so much so, that even if a clerk has been instituted upon the Crown's presentation, the Crown may before induction revoke it, and present another clerk (*k*). Upon institution, the clerk may enter on the parsonage house and glebe, and take the tithes; but he may not grant or let them, or bring an action for them, till induction.

Induction to the temporalities is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like, the original intent having been to give all the parishioners due notice and sufficient certainty of their new minister. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual; and when a clerk is thus presented, instituted, and inducted into a living, he is then, and not before, in full and complete possession (*l*).] The title, however, of any person instituted, collated, or licensed, to any benefice with cure of souls will be afterwards divested, unless on the first Lord's day on which he officiates in the church of the benefice, or such other Lord's day as the ordinary shall appoint and allow, he shall publicly read therein, in the presence of the congregation, the Thirty-nine Articles of religion, and immediately afterwards repeat the "declaration of assent" prescribed by the Clerical Subscription Act, 1865, which he made previously to his ordination (*m*). This formality is called "reading in."

In addition to the methods of acquisition which have

(*i*) Clerical Subscription Act, 1865, s. 5.

(*k*) Co. Litt. 344.

(*l*) Co. Litt. 300.

(*m*) Sect. 7.

been mentioned, there were formerly benefices which a clerk might obtain by mere donation, that is, by deed of gift alone, without presentation, institution, or induction; and they were thence called *donative* benefices. [These last-mentioned benefices were created whenever the king, or any subject by his licence, founded a church or chapel, and ordained that it should be merely in the gift or disposal of the patron; be subject to his visitation only, and not to that of the ordinary; and become vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (*n*). This is said to have been antiently the only way of conferring ecclesiastical benefices in England (*o*). But the truth seems to be, that where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him; but that where the clerk was already in orders, the living was usually vested in him by the simple donation of the patron.

But if the patron of a donative *once* waived his privilege, the advowson became for ever presentative, and could never be donative any more (*p*); and now, by the Benefices Act, 1898 (*q*), s. 12, all donatives are made presentative.

3. The *rights* of the clergy in their tithes and ecclesiastical dues will be considered hereafter as part of the endowments and provisions of the Church (*r*); and as regards the duties of the clergy, these are principally of ecclesiastical cognizance, except where otherwise appointed by statute (*s*). We shall here refer, therefore,

(*n*) Co. Litt. 344.

(*o*) Seld. *Tith.* ch. 12, s. 2; Decretal. l. 3, t. 7, ch. 3.

(*p*) Co. Litt. *ubi sup.*; *Farchild* v. *Gayre* (1603), Cro. Jac. 63; Wats. C. L. 170; *Repington* v. *Governors of Tamworth School* (1763), 2 Wils. 150; *Rennell* v. *Bishop of Lincoln* (1832), 8 Bing. 490; *The Queen* v. *Foley* (1846), 2 C. B. 664.

(*q*) 61 & 62 Vict. c. 48.

(*r*) *Vide post*, bk. IV. pt. II. ch. III.

(*s*) Among the treatises on the law of the Church which may be

[only to the article of residence, upon the supposition of which the law doth style every parochial minister an *incumbent*.]

The present enactments on the subject of residence will be chiefly found in the Pluralities Acts, 1838, 1850, and 1887, and in the Benefices Act, 1898 (*t*), ss. 8, 9. The first of these Acts provides, that every spiritual person holding a benefice shall reside thereon, and in the house of residence (if any) belonging thereto; and that if he absents himself for a period exceeding three months, (either accounted together or at several times,) in any one year, he shall forfeit, unless resident at some other benefice to him belonging, a proportionate part of the annual value of the benefice at which he so fails to reside (*u*). But this rule is subject to various exceptions and modifications, of which the principal are as follows :—1st, The heads of all colleges and halls in the universities of Oxford or Cambridge, the warden of the university of Durham, and the head masters of Eton, Winchester, and Westminster school, are exempt from its requirements (*x*); 2nd, deans and archdeacons, and a variety of public professors, readers, preachers, and chaplains specified in the Acts, as likewise the provost of Eton, the warden of Winchester, the master of the Charterhouse, the principal of St. David's, and of King's College, London, and also (provided they are not absent from their benefices more than *five* months in the year) the fellows of Eton and Winchester, and all canons, minor canons, priest vicars, and vicars choral, are severally entitled to count the time passed at their official residences or in the performance of their duties, as if it had been passed in residence upon their benefices (*y*); 3rdly, if

relied upon with confidence, are Bishop Gibson's *Codex*, Dr. Burn's *Ecclesiastical Law*, Dr. Phillimore's *Ecclesiastical Law*, and the earlier editions of the *Clergyman's Law*, published under the name of Dr. Watson, but compiled by Mr. Place, a barrister.

(*t*) 61 & 62 Vict. c. 48.

(*u*) 1 & 2 Vict. c. 106, s. 32.

(*x*) Sect. 37.

(*y*) Sects. 38, 39.

there be no fit residence belonging to the benefice, the bishop may from time to time license the incumbent to reside in some other house within a certain specified distance from his church or chapel, and such house thereupon becomes a legal house of residence for all purposes; 4thly, if there be no fit house of residence, and no convenient house can be obtained within the specified distance, or if the incumbent cannot reside on his benefice by reason of any incapacity of mind or body, or owing to the dangerous illness of his wife or child, (but subject in the latter case to certain restrictions as to time and otherwise,) application may be made to the bishop for a licence of non-residence (*z*); 5thly, if the incumbent shall occupy, in the same parish, any mansion whereof he is the owner, a similar application for a licence to reside therein may be made (*a*); and 6thly, the bishop is empowered, in any other case, but only under special circumstances, and subject to allowance by the archbishop, to grant a licence to reside out of the limits of the benefice (*b*).

It is further provided by the Pluralities Act, 1838, that annual returns of such of the clergy as are resident, and of such as are non-resident, shall be made to his Majesty in council (*c*); and that, in case of non-residence, the bishop, instead of proceeding to enforce the penalties above mentioned, may, if he thinks fit, issue a monition against the offender, to be followed up by an order to reside. In case of non-compliance with such order, the bishop may proceed to sequester the profits of the benefice, and apply them for the purposes in the Act specified (*d*); and in case of long-continued or repeated sequestration for a year or more, the benefice is to become void, and a new presentation may be made, as if the former holder

(*z*) Sect. 43.
(*a*) *Ibid.*
(*b*) Sect. 44.
(*c*) Sects. 51, 52.
(*d*) Sect. 54; *Ex parte Bartlett* (1848), 12 Q. B. 488; *Bartlett* v. *Kirkwood* (1853), 2 El. & Bl. 771.

were dead (*e*). So that sequestration is now become a ground of deprivation (*f*).

For the more effectual promotion of this important duty of residence, among the parochial clergy, there are also contained in the statute book a variety of provisions for repairing the houses of residence, and for building or purchasing new ones, and for raising money, for these purposes, by mortgage of the benefices (*g*); the money being lent by the Governors of Queen Anne's Bounty (*h*).

4. As regards the ways in which a clerk may lose his preferment, he may lose it, 1stly, by *cession*, or taking another benefice. For, by the Pluralities Act, 1838 (in substitution for the previous provisions of the 21 Hen. VIII. (1529), c. 13), as amended by the Pluralities Act, 1850, and the Pluralities Act, 1885, s. 14, no person may hold together any two or more benefices, except in the case of two whereof the churches are within four miles of one another, by the nearest road, and the annual value of one of them does not exceed 200*l*., which, being *contiguous* benefices, may be united (*i*); and that no person, holding a benefice with cure of souls embracing a population of more than 3,000, may hold therewith any other benefice with a population of more than 500; and that no person, holding two benefices with cure of souls, may hold therewith a third, or any cathedral preferment (*k*). Upon every admission to a new benefice or preferment contrary to

(*e*) Sect. 58.

(*f*) Benefices Act, 1898, s. 10.

(*g*) 17 Geo. 3 (1777), c. 53; 21 Geo. 3 (1781), c. 66; 43 Geo. 3 (1803), cc. 107, 108; 51 Geo. 3 (1811), c. 115; 55 Geo. 3 (1815), c. 147; 6 Geo. 4 (1825), c. 8; 7 Geo. 4 (1826), c. 66; 1 & 2 Vict. (1838), cc. 23, 29, 106, ss. 25, 62, &c.; 3 & 4 Vict. (1840), c. 113, s. 59; 4 & 5 Vict. (1841), c. 39, s. 18; 5 & 6 Vict. (1842), c. 26 (repealing 2 & 3 Vict. (1839), c. 18); 19 & 20 Vict. (1856), c. 104, s. 27; 28 & 29 Vict. (1865), c. 69; 34 & 35 Vict. (1871), c. 43.

(*h*) 49 & 50 Vict. (1886), c. 34; 49 & 50 Vict. (1886), c. 54, s. 12.

(*i*) 1 & 2 Vict. (1838), c. 106; 13 & 14 Vict. (1850), c. 98; 23 & 24 Vict. (1860), c. 142; and 34 & 35 Vict. (1871), c. 90; 61 & 62 Vict. (1898), c. 23.

(*k*) 1 & 2 Vict. (1838), c. 106, s. 2.

these Acts, every benefice previously held becomes void *ipso facto* (*l*). But all these prohibitions, in respect of population and yearly value, are subject to a provision whereby the Archbishop of Canterbury is enabled, in certain cases, to grant a dispensation therefrom on recommendation of the bishop of the diocese (*m*).

A clerk may lose his preferment, 2ndly, [by *consecration*. For when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated. A method was formerly in use, by the favour of the Crown, of holding such livings *in commendam*. *Commenda* (*ecclesia commendata*) was a living commended by the Crown to the care of a clerk, to hold till a proper pastor should be provided for it; which commendation might be temporary—for one, two, or three years,—or it might be perpetual. And this sort of commendation (or dispensation) used to be granted to bishops in the poorer sees, to aid the deficiency of their episcopal revenues (*n*).] But now, by the Ecclesiastical Commissioners Act, 1836, s. 18, no ecclesiastical dignity, office, or benefice may, in future, be held *in commendam* by any bishop; and every *commendam* thereafter granted, whether to retain (*retinere*) or to receive (*recipere*), and whether temporary or perpetual, is absolutely void to all intents and purposes (*o*).

A clerk may lose his preferment, 3rdly, [by *deprivation*. Which may be, on such nonfeasance or neglect, malfeasance or crime, as any penal statutes declare shall avoid the benefice (in which cases, the benefice is *ipso facto*

(*l*) Sect. 11; 13 & 14 Vict. (1850), c. 98, s. 7.

(*m*) 1 & 2 Vict. (1838), c. 106, ss. 5, 6. See also, as regards *persons holding cathedral preferments*, 1 & 2 Vict. (1838), c. 106, s. 11; 4 & 5 Vict. (1841), c. 39; 13 & 14 Vict. (1850), c. 98, s. 11; as regards *deans of cathedrals*, 13 & 14 Vict. (1850), c. 94, s. 19; and as regards *heads of colleges*, 13 & 14 Vict. (1850), c. 98, ss. 5, 6.

(*n*) *Colt* v. *Bishop of Lichfield and Coventry* (1613), Hob. 144.

(*o*) See also (as to the Bishop of Sodor and Man) 1 & 2 Vict. (1838), c. 30; and (as to the Universities of Oxford and Cambridge) 61 & 62 Vict. (1898), c. 48, s. 7.

[void without any formal sentence of deprivation) (*p*) ; or it may be, upon sentence declaratory under the Clergy Discipline Act, 1892, on the clerk's conviction of treason or felony or of any misdemeanor involving imprisonment with hard labour or any greater punishment (*q*) ; or on a bastardy order being made against him ; or on a finding of the Divorce Court that he has committed adultery ; or on a separation order being made against him, either by the Divorce Court or under the Matrimonial Causes Act, 1878,—the bishop in every such case declaring, within twenty-one days after the conviction finding or order become final, his benefice vacant and himself incapable of holding preferment (sect. 1) ; and under the Benefices Act, 1898 (*r*), s. 10, a sequestration which has continued for one whole year, or a sequestration twice repeated, is made a ground of deprivation. A sentence of deprivation may also be for heresy (*s*), infidelity (*t*), and the like ; or on a third conviction of having engaged in trade (*u*) ; or for simony (*x*), or plurality ; or for maintaining any doctrine in derogation of the king's supremacy, or of the Thirty-nine Articles, or of the Book of Common Prayer (*y*)] ; or for neglecting to read in church the Thirty-nine Articles, and to make the proper "declaration of assent" at the time appointed by the ordinary (*z*) ; or for using any other form of prayer than the Liturgy of the Church of England (*a*) ; or for continued neglect,

(*p*) *Re Dean of York* (1841), 2 Q. B. 1 ; *Ex parte Denison* (1854), 4 El. & Bl. 292.

(*q*) *Bishop of Chichester* v. *Webb* (1555), Dyer, 108 ; Jenk. 210.

(*r*) 61 & 62 Vict. c. 48.

(*s*) *Ex parte Denison* (1854), 4 El. & Bl. 292 ; *Combe* v. *Edwards* (1878), 3 P. D. 103. It is often stated that the only penalty at present for illegal practices of the clergy is imprisonment. This is incorrect ; deprivation has always been the ultimate penalty.

(*t*) Fitz. Abr. tit. *Trial*, 54.

(*u*) 1 & 2 Vict. (1838), c. 106, s. 31.

(*x*) 31 Eliz. (1588), c. 6 ; 13 Ann. (1713), c. 11.

(*y*) 1 Eliz. (1558), cc. 1, 2 ; 13 Eliz. (1571), c. 12.

(*z*) Clerical Subscription Act, 1865.

(*a*) 1 Eliz (1558), c. 2.

after order from the bishop followed by sequestration, to reside on the benefice (*b*).

A clerk may lose his preferment, 4thly, by *resignation*; but this is of no avail, till accepted by the ordinary, into whose hands the resignation of the benefice must be made (*c*). And in connection with this last mode of vacating a preferment, it is necessary to notice an Act, called the Clerical Disabilities Act, 1870, which was passed with the object of relieving persons who had been admitted to the office of priest or deacon in the Church of England, from certain disadvantages to which (until protected by that statute) they were exposed. In order to effect this object, the Act provides, that any person admitted to holy orders may, after having resigned any and every preferment by him held, execute and cause to be enrolled in Chancery a deed of *relinquishment* in a prescribed form, and deliver an office copy of the same to the bishop of his diocese, to be recorded in the diocesan registry; and, on the bishop causing the deed to be recorded in the registry, the clergyman becomes incapable of acting in any way as a minister of the Church of England, and ceases to enjoy any right or privilege attaching to such office. On the other hand, he is *freed from all disabilities, disqualifications, restraints and prohibitions* to which he would, under certain statutes, have been subject as a person who had been admitted to holy orders (*d*), and from all penalties and proceedings to which he might under any law have been amenable, in consequence of any act or thing by him done under such admission (*e*). And we may also usefully notice here

(*b*) 1 & 2 Vict. (1838), c. 106, s. 58.

(*c*) *Fane's Case* (1608), Cro. Jac. 198; *Martin* v. *Mackonochie* (1883), 8 P. D. 191.

(*d*) 41 Geo. 3 (1801), c. 63; 5 & 6 Will. 4 (1835), c. 76, s. 28; 3 & 4 Vict. (1840), c. 86.

(*e*) 33 & 34 Vict. (1870), c. 91, s. 4; *Ex parte a Clergyman* (1873), L. R. 15 Eq. 154. There is a *locus pœnitentiæ*, if nothing more is done after enrolment.

another Act, called the Incumbents Resignation Act, 1871, by which (as amended by the Act of 1887), a clergyman permanently incapacitated by illness may resign his benefice ; and may receive a pension, to the amount of one-third the clear annual value, charged on the revenues of the benefice, recoverable as a debt from the subsequent incumbent thereof.

VI. The lowest degree of ecclesiastical persons is the CURATE, who is a clerk in holy orders employed by the rector, vicar, or other incumbent of a living, either to serve in his absence, or as his assistant, as the case may be (*f*). Every stipendiary curate, before he enters on his duties, must, however, be *licensed* by the archbishop or bishop of the diocese (*g*) ; and such licence may be afterwards revoked (*h*). Also, before the licence is granted, the curate must sign the stipendiary curate's declaration, that he will *bonâ fide* receive from his future vicar the whole stipend as arranged (*i*). He must also, on entering on his curacy (unless, having been ordained on the same day, he has already done so), make and subscribe the "declaration of assent" to the Thirty-nine Articles and Book of Common Prayer ; and on the first Lord's day on which he officiates, he must publicly and openly repeat such declaration in the presence of the congregation, and during the time of divine service (*k*). For the proper sustentation and payment of licensed curates, the law has made a variety of provisions ; thus, by the 28 Hen. VIII. (1536), c. 11, a curate who shall serve a church during its vacancy, shall be paid such stipend as the ordinary thinks reasonable out of the

(*f*) Burn, *Ecc. Law*, by Tyrw., vol. ii. p. 54 (*a*) ; *Arnold* v. *Bishop of Bath* (1829), 5 Bing. 316 ; and, as to *lecturers* and *preachers*, see 7 & 8 Vict. (1844), c. 59.

(*g*) Burn, vol. i. p. 61 ; Watson, C. L. 147, 207, 335.

(*h*) *R.* v. *Archbishop of Canterbury* (1859), 1 El. & El. 545 ; *Poole* v. *Bishop of London* (1861), 7 Jur. (N.S.) 347.

(*i*) Clerical Subscription Act, 1865, s. 6.

(*k*) *Ibid.* s. 8.

profits accruing during the vacancy; or, if that be not sufficient, it shall be made up by the successor, within fourteen days after he takes possession. And by the Pluralities Act, 1838, numerous provisions are made as to the appointment and payment of curates, among which are the following:—that in certain cases of non-residence by the incumbent, the bishop may, in his default, appoint a proper resident curate, with a stipend (*l*); that where the bishop sees reason to believe that the duties of any benefice are inadequately performed, or where it is of a certain value or extent, he may (though in the first case only after referring the matter to certain commissioners appointed by him for that purpose) require the incumbent, whether actually resident or not, to nominate a proper curate with sufficient stipend, and on his default may himself make such appointment (*m*), which appointment the bishop may now, by the Benefices Act, 1898, make, without first requiring the incumbent to do so (*n*); and that the stipend of every curate appointed by the bishop shall be adjusted in proportion to the value and population of the benefice, the stipend not in any case falling short of 80*l.* per annum, or of the whole annual value of the benefice, if it be under that amount (*o*); and in all cases of dispute between the incumbent and the curate as to his stipend, the bishop may summarily decide between them without appeal, and may enforce his sentence by monition and sequestration (*p*). Also, by the Pluralities Act, 1885, it is provided, that the bishop may assign to any curate or curates appointed and licensed by him such stipend as he may think fit, not exceeding by 70*l.* the respective stipends allowed to curates by the Pluralities Act, 1838, s. 77, in the case of non-resident incum-

(*l*) Sects. 76, 86.

(*m*) Sects. 77, 78.

(*n*) 61 & 62 Vict. (1898), c. 48, s. 9.

(*o*) 1 & 2 Vict. (1838), c. 106, s. 85.

(*p*) Sect. 83; *Daniel* v. *Morton* (1850), 16 Q. B. 198.

bents (*q*) ; and may in certain cases appoint two or more curates in the case of such non-resident incumbents (*r*), with an adequate provision for each. And it is also provided, that whenever the incumbent of any benefice is non-resident with the licence of the bishop, he shall not (without the bishop's permission) resume the duties of the benefice until the expiration of the licence, or interfere with the curate or curates thereof appointed by the bishop (*s*).

VII. [CHURCHWARDENS (*t*) are the guardians or keepers of the fabric and furniture of the church, and the representatives of the general body of the parishioners ;] and they are always lay persons (*u*). They are sometimes appointed by the minister, sometimes by the parish in vestry assembled (*x*), and sometimes by both minister and parishioners together, as the custom of the place directs (*y*). But, where there is no such custom, the election must be according to the directions of the canons (*z*) : and these require that churchwardens shall be chosen by the joint consent of the minister and parishioners, if it may be, but, if they cannot agree, then the minister is to choose one, and the parishioners another (*a*). The Church Building Acts (*b*), and the New Parishes

(*q*) Sect. 8.

(*r*) Sect. 9.

(*s*) Sect. 12.

(*t*) Bac. Abr., and Burn, *Ecc. Law* and *Encyclop. of English Law*, *in tit.* "Churchwardens"; *Ex parte Winfield* (1835), 3 A. & E. 614 ; *R.* v. *Marsh* (1836), 5 A. & E. 468 ; *Bray* v. *Somer* (1862), 2 B. & S. 374.

(*u*) Hard. 379 ; 1 Rol. Ab. 653 ; 2 Rol. Rep. 107.

(*x*) As to vestries, *vide sup.* vol. I. p. 70.

(*y*) *Campbell* v. *Maund* (1836), 5 A. & E. 865 ; *R.* v. *Rector of Lambeth* (1838), 8 A. & E. 356 ; *Bremner* v. *Hull* (1866), L. R. 1 C. P. 748.

(*z*) *Catton* v. *Barwick* (1718), Str. 145.

(*a*) Canon 89 of 1603 ; *R.* v. *Allen* (1872), L. R. 8 Q. B. 69 ; *Rex* v. *Bishop of Salisbury*, [1901] 1 K. B. 573.

(*b*) 58 Geo. 3 (1818), c. 45, s. 73 ; 1 & 2 Will. 4 (1831), c. 38, ss. 16, 25 ; and 8 & 9 Vict. (1845), c. 70, ss. 7, 8.

Acts (*c*), as to the churches respectively within the provisions of those Acts, contain express provisions as to the election of churchwardens, as do schemes under the London Government Act, 1899 (*d*), in the case of old ecclesiastical parishes in the metropolis. In general, all churchwardens are chosen yearly in Easter week, and are usually two in number for each parish; they are obliged, when chosen, to serve (*e*), and are sworn to execute their office faithfully (*f*). [They are taken, in favour of the church, to be for some purposes a kind of corporation at common law; that is, they are enabled, by the name of "churchwardens," to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish (*g*). And it is said, that churchwardens in the city of London are a corporation for all purposes (*h*). One of the chief duties of churchwardens is the care and management of the goods belonging to the furniture of the church, such as the organ, bells, Bible, and parish books (*i*). But as to the fabric of the church and also as to the churchyard, they have no sort of interest in the property

(*c*) 6 & 7 Vict. (1843), c. 37, s. 17; 19 & 20 Vict. (1856), c. 104, s. 28.

(*d*) 62 & 63 Vict. c. 14.

(*e*) The following classes of persons are either insligible or exempted, viz., peers of the realm; members of parliament; clergymen of the Church of England; Roman Catholic clergy; dissenting ministers; barristers; solicitors; clerks in court; physicians, surgeons, and apothecaries (if duly registered); aldermen; dissenting teachers; and all persons living out of the parish, unless they occupy a house of trade therein. (See Steer, *Parish Law*, p. 84.)

(*f*) Canon 88; *Ex parte Winfield* (1835), 3 A. & E. 614, 615.

(*g*) 9 Geo. 1 (1722), c. 7, s. 4; and (in regard to *parish lands*) 59 Geo. 3 (1819), c. 12, ss. 8, 17; 5 & 6 Will. 4 (1835), c. 69, s. 4; *Smith* v. *Adkins* (1841), 8 M. & W. 362; and (in regard to compensation for the *common rights* of parishes) 45 & 46 Vict. (1882) c. 15.

(*h*) Pulling, *Laws of London*, 263; Rogers, *Eccl. Law*, 185.

(*i*) Bac. Abr. *Churchwardens*, B.; Watson C. L. 390; *Addison* v. *Round* (1836), 4 A. & E. 799; *Jackson* v. *Adams* (1835), 2 Bing. N. C. 402.

[thereof; and if any damage be done thereto, the rector only, or vicar, shall have the action (*k*)]. But this last remark, of course, does not apply to the cemeteries and burial grounds set apart under the modern Burial Acts, which are referred to in the third volume of this work.

It is also part of the office of churchwardens, unless other persons are appointed by the ordinary for that purpose, to have the care of the benefice, during its vacancy, or while it is under sequestration for the debts of the incumbent (*l*). They are, moreover, required to see to the reparation of the church, and to the making of the *church rates*, by which the expenses thereof are to be defrayed. These rates are charged on all lands and houses in the parish, are assessed on the occupiers, and are made by the parishioners at large, that is, by the *majority* of the parishioners present at a vestry summoned for that purpose by the churchwardens (*m*). But they are not now, as a general rule, *compulsory* on the persons rated; and the only consequence of refusing to pay them is a disqualification from voting on the expenditure of the moneys arising from the rate. This important change in the law was effected in the year 1868, by the Compulsory Church Rates Abolition Act, the reason being, that church rates had for years ceased to be made or collected in many parishes by reason of the opposition thereto, and the levying thereof had given rise to litigation and ill-feeling; but (by section 2) there are excepted from the operation of the Act all rates which, under the name of church rates, are made by the authority of any Act of Parliament, and are applicable in part to other than ecclesiastical purposes and some other special cases. These accordingly are governed by the previous law on this subject. *Voluntary* rates are still often levied for church schools and the like.

(*k*) *Beckwith* v. *Harding* (1818), 1 B. & Ald. 508.

(*l*) Steer, *Parish Law*, 91.

(*m*) *The Braintree Case* (*Burder* v. *Veley* (1840), 12 A. & E. 247; *Gosling* v. *Veley* (1852), 4 H. L. C. 679.

It is a further part of the duties of churchwardens to make such order relative to seats in the church and chancel, not appropriated to particular persons, as the ordinary—who has in general the sole power in this matter (*n*)—shall direct; and, in practice, the arrangements with regard to the sittings are usually made by the churchwardens, without any special direction from the ordinary (*o*). It is incident also to the office of churchwarden, to enforce proper and orderly behaviour in the church and its precincts during the performance of divine service (*p*); and, to this end, it has been held, that a churchwarden may justify the pulling off a man's hat irreverently worn in the church, or the removal of the offender from the church (*q*). And besides these, there are a multitude of other parochial powers committed to the charge of the churchwardens which cannot be here particularized with minuteness. Formerly, also, the churchwardens were entitled (and even obliged), by the Act of Uniformity of 1558, to levy a tax of one shilling on every householder who failed to resort to his own parish church on Sundays or holidays. But the Act of 1558 was repealed by the Religious Disabilities Act, 1846. Formerly, also, the churchwardens were joined with the overseers in the care and maintenance of the poor; but this duty is now also in general taken from them by the Local Government Act, 1894, s. 5, in rural parishes (*r*). And by the provisions of the London Government Act, 1899 (*s*), churchwardens of every parish within a metropolitan borough have ceased to be overseers.

(*n*) 3 Inst. 202; *Clifford* v. *Wicks* (1818), 1 B. & Ald. 506; Wats. C. L. 288.

(*o*) Rogers, *Eccl. Law*, 179; *Ritchings* v. *Cordingley* (1868), L. R. 3 A. & E. 113.

(*p*) *Worth* v. *Terrington* (1845), 13 M. & W. 781; *Asher* v. *Calcraft* (1887), 18 Q. B. D. 607; *Taylor* v. *Timson* (1888), 20 Q. B. D. 671.

(*q*) Hawk. P. C. bk. 1, ch. 63, s. 29; *Hawe* v. *Planner* (1666), 1 Saund. 10; S. C., 1 Sid. 301.

(*r*) *Vide post*, bk. IV. pt. III. ch. III.

(*s*) 62 & 63 Vict. c. 14, s. 23.

Such, then, in general, are the duties of churchwardens; and for the better discharge of their duties, or of such of them as require legal knowledge, they may in general have a *vestry clerk* to assist them (*t*). We will add, in conclusion, that churchwardens, in case of their wasting the goods of the church, or being guilty of other misbehaviour, are liable to removal (*u*); and that, at the end of their year of office, they are bound to render an account of all their receipts and disbursements (*x*).

Sidesmen, or synods men, are elected in many old parishes: by the canons they are to be chosen yearly in Easter week in the same manner as churchwardens.

VIII. PARISH CLERKS and SEXTONS are also persons connected with the church; and by the common law, they have freeholds in their offices (*y*). But, under the Lecturers and Parish Clerks Act, 1844, s. 5, parish clerks may be suspended or removed by the archdeacon or other ordinary for misconduct or neglect. The *parish clerk*, in some few instances, is in holy orders (*z*); but, in general, his qualification is only that he should be at least twenty years of age, and known to the rector, vicar, or other minister, to be of honest conversation, and to be sufficient for his office (*a*). He is generally appointed by the incumbent (*b*), but, by custom, he may be chosen by the inhabitants of the parish (*c*); his appointment may be either in writing or by word of mouth (*d*); and his remuneration usually depends upon the custom of the particular parish (*e*). In the case of churches which are

(*t*) Vestries Act, 1850, ss. 6—8.

(*u*) Steer, *Parish Law*, 95.

(*x*) *Ibid.* 92; *Leman* v. *Goulty* (1789), 3 T. R. 3; *Astle* v. *Thomas* (1823), 2 B. & C. 271.

(*y*) Steer, 96.

(*z*) 7 & 8 Vict. (1844), c. 59, ss. 2, 3, 4.

(*a*) Canon 91 of 1603.

(*b*) *Ibid.*

(*c*) 13 Rep. 70; *Jermyn's Case* (1624), Cro. Jac. 670; *Peak* v. *Bourne* (1733), Str. 942; *Hartley* v. *Cook* (1833), 9 Bing. 728.

(*d*) *R.* v. *Inhabitants of Bobbing* (1836), 5 A. & E. 682.

(*e*) Steer, 97.

subject to the Church Building Acts, he is appointed *annually* by the minister (*f*); and in the case of a parish constituted under the New Parishes Acts, he is appointed by the incumbent and also removeable by him, but in each case with the consent of the bishop (*g*).

The *sexton* (*h*) is, in the ordinary course, chosen by the incumbent, though sometimes by the parishioners, where a usage to that effect prevails (*i*); and his salary depends on custom, and is paid by the churchwardens out of any funds in their hands for that purpose. The duty of the sexton is to cleanse the church, to open the pews, to dig the graves for the dead, to provide candles and other necessaries, and to prevent, or assist in preventing, disturbance in the church (*k*). In the case of parishes constituted under the Church Building Acts, the sexton's appointment, and his duties and emoluments, are prescribed by these Acts (*l*); and in new parishes, his appointment is like that of the parish clerk (*m*).

In conclusion, we will observe, that, besides the parish clerk and sexton, there is sometimes attached to the church a *beadle*, whose business is to attend the vestry, to give notice of its meetings to the parishioners, and to execute its orders (*n*); and in most churches, there are *pew-openers*, *collectors*, and the like. But none of these are (as such) ecclesiastical persons.

(*f*) 58 Geo. 3 (1817), c. 45; 59 Geo. 3 (1819), c. 134; *Pinder* v. *Barr* (1854), 4 El. & Bl. 105; *Jackson* v. *Courtenay* (1857), 8 El. & Bl. 8.

(*g*) 19 & 20 Vict. (1856), c. 104, s. 9.

(*h*) Apparently, from *sacristan*, the keeper of things belonging to divine worship.

(*i*) Rogers, *Eccl. Law*, p. 884; *R.* v. *Inhabitants of Bobbing, ubi sup.*; *Canefield* v. *Blenkinsop* (1849), 4 Exch. 234.

(*k*) *R.* v. *Inhabitants of Liverpool* (1789), 3 T. R. 118; Shaw, *Parish*, ed. 1892, 123.

(*l*) 59 Geo. 3 (1819), c. 134, ss. 6, 10.

(*m*) 19 & 20 Vict. (1856), c. 104, s. 9.

(*n*) Shaw, 121.

CHAPTER II.

ON THE DOCTRINES AND WORSHIP OF THE CHURCH, AND HEREIN OF THE LAWS AS TO HERESY AND NONCONFORMITY.

THOUGH this nation has from the earliest times adhered to the principle of an established church, yet no claim was at first made by the law to interfere with the faith, ceremonies, or discipline of the church. But at the era of the Reformation, it was found necessary to resort to the legislature for an authoritative exposition of the true Protestant faith, and for the establishment of appropriate forms of worship; and from that era, the power of the ecclesiastical authorities, even in matters of religion and of worship, has been exercised in subordination to the positive enactments of the legislature (*a*).

Accordingly, the *Articles of Faith*, originally forty-two in number, but afterwards reduced to thirty-nine, (and commonly called the *Thirty-nine Articles*,) were framed by Archbishop Cranmer, with the assistance of other persons of distinguished learning and piety, in the reign of Edward the Sixth; and were reduced to their present form in the convocation of the archbishops and bishops of both provinces, held at London in the reign of Queen Elizabeth, A.D. 1562. By these Articles (among other matters) the canonical authority of the different books of the Bible was settled, a new version of the Holy Scriptures being afterwards made in the reign of James the First, which

(*a*) *Noble* v. *Voysey* (1871), L. R. 3 P. C. 357; *Sheppard* v. *Bennett* (1871), *ibid.* 4 P. C. 371.

is still in use under the denomination of King James's Bible, of which there are certain revisions of a comparatively recent date, and having no statutory authority.

The *Form of Prayer and Church Service*, commonly called the *Liturgy*, was also first framed in the reign of Edward the Sixth, and by the same prelates. Prior to the Reformation, various liturgies had been in use in different parts of the realm (*b*). But a new ritual (chiefly founded, however, on the antient services), with *rubrics* prescribing the order and form to be pursued, was then compiled, under the direction of that prince, for the uniform observance of the whole reformed Church of England (*c*). This ritual (which is, for the most part, the same with our present Book of Common Prayer) was established by the statute 2 & 3 Edw. VI. (1548), c. 1; and, being afterwards revised, was confirmed by 5 & 6 Edw. VI. (1551), c. 1, and 1 Eliz. (1558), c. 2. After two other successive revisions, in the reigns of King James the First and Charles the Second, it was confirmed in its present form, by 14 Car II. (1662), c. 4, usually described as *the* Act of Uniformity (*d*).

As to the *Crown's Supremacy* in matters ecclesiastical, it was definitely established by the 1 Eliz. (1558) c. 1,

(*b*) See the preamble to the statute 2 & 3 Edw. 6 (1548), c. 1. Our Liturgy is taken principally from the form called in such preamble "*the use of Sarum*"; but most of it can be traced to periods before the Conquest. (See Palmer, *Origines Liturgicæ*.)

(*c*) *Elphinstone* v. *Purchas* (1870), L. R. 3 A. & E. 66; *Martin* v. *Mackonochie*, *ibid.* (1874), 4 A. & E. 279; 3 P. C. 52, 409; *Hebbert* v. *Purchas* (1871), *ibid.* 605.

(*d*) Watson C. L. p. 321. Since the Act of Uniformity, the following changes have been made, viz., the church services for 30th January, 29th May, 5th November, and 23rd October, were abolished by 22 Vict. (1859), c. 2; the table of lessons contained in the calendar was revised and re-arranged by the 34 & 35 Vict. (1871), c. 37; and certain modifications were made in the order of prayer, for use on any day except Sunday, Christmas-day, Ash Wednesday, Good Friday, and Ascension-day by the 35 & 36 Vict. c. 35 (Act of Uniformity Amendment Act, 1872).

usually called *the* Act of Supremacy, a statute which, in the first place, provides that no foreign prince or potentate, spiritual or temporal, shall exercise any manner of jurisdiction or privilege, spiritual or ecclesiastical, within this realm or the dominions thereof; and next, that such jurisdictions and privileges as had before been exercised by any spiritual or ecclesiastical power, for visitation and correction of the Church, shall for ever be united and annexed to the imperial crown of this realm. But the Act of Elizabeth was merely declaratory; for the ecclesiastical supremacy of the Crown had been before claimed by the 26 Hen. 8 (1534), c. 1, and indeed, prior to the Reformation, by the Statute of Præmunire, 16 Ric. 2 (1392), c. 5 (*e*).

The new regulations thus introduced by parliament, taken in connection with other legislative enactments of the same era, but of subordinate importanee, and in connection also with the canon law, (which still gives the rule where the statutes are silent,) have constituted, from the period of which we speak, and still constitute, the standard of faith, worship, and discipline in the Church of England; and for a beneficed clergyman advisedly to maintain any doctrine in derogation of the king's supremacy, or of the Thirty-nine Articles, or of the Liturgy as by law established, or to neglect to declare his assent publicly to such Articles and Liturgy at the time and in the place appointed for that purpose, or to use any other form of prayer than that contained in such Liturgy, is ground for deprivation.

And if we now consider, whether this standard is binding merely on those who claim the benefits of the church establishment, or generally on all the subjects of the realm, we shall find that the law has passed through some very remarkable changes on this head. For, though the Act of Supremacy effected an emancipation from the papal

(*e*) 4 Inst. 42, 331, 341. Henry VIII. claimed the title of *Supreme Head* of the English Church: Elizabeth modified this to *supreme governour*.

yoke, and may therefore be justly considered as having laid the foundation of our spiritual freedom, it was not till long afterwards that the nation learned the lesson of religious toleration; and in the mean time, our temporal laws proceeded not only to imitate the persecutions of the Popish time, but in some respects to surpass them. For while our law continued to punish (in aid of the ecclesiastical authorities) the offence of *heresy* as before, employing for that purpose the writ *de hæretico comburendo*, which was not abolished until the 29 Car. II. (1677), c. 9, it began also to exercise new rigours of its own in dealing with the offence of *nonconformity*,—*i.e.*, dissent from the worship and ceremonies of the reformed Established Church. So early as the 5 & 6 Edw. VI. (1551), c. 1, non-conformity was made a highly penal offence; and even to be present at any other form of worship than that which was by law established, rendered the offender liable to imprisonment. By the same statute, and by the Act of Uniformity of 1558, a fine of twelve pence, to be levied by the churchwardens for the use of the poor, was imposed on such as failed to resort to their proper parish church on Sundays and holidays. And the penal portions of these statutes, though for a long course of time fallen into neglect, yet remained in our statute book, till (in common with many other penal and disabling laws in regard to religious opinions) they were swept away by the Religious Disabilities Act, 1846, to which we shall make further allusion before we close this chapter. In the reign, moreover, of Queen Elizabeth, a schism began to develop itself in the newly-established Protestant Church, certain persons, who received the appellation of *Puritans*, deserting the use of the Liturgy, and (in defiance of the above enactments) betaking themselves to forms of worship of their own institution (*f*); until ultimately, as they increased in number, they branched out into various divisions of

(*f*) Hallam, *Const. Hist.* vol. i. pp. 246, 251, 280.

religious opinion, and into various modes of religious ceremonial and Church government. From which stock have indeed descended all those Protestant seceders from the Established Church, described at a later period as *Nonconformists*, and in modern times, as *Dissenters*, and being also variously designated and distinguished by the specific names of Wesleyans, Baptists, Presbyterians, and the like (*g*).

The jealousies to which these growing innovations gave rise, and the alarm from time to time excited by the enterprising spirit of Popery, gave birth to a variety of enactments, which had for their common object the repression of non-conformity and the discouragement of Papists. Thus, by the Act of Uniformity (14 Car. II. c. 4), it was enacted, that the Book of Common Prayer should be used in every place of public worship, and that every teacher of youth should make a written declaration that he would conform to the Liturgy, and should obtain from the ordinary a *licence* to teach; and by the Act against Conventicles (22 Car. II. (1670), c. 1), all meetings consisting of five persons or more (exclusive of the family), assembled for the exercise of religion in any manner other than according to the Liturgy and practice of the Church of England, were prohibited, subject to pecuniary forfeitures.

The Revolution of 1688, however, was the commencement of an era of more liberal legislation in matters of religion; and by the Toleration Act of 1689, persons dissenting from the Church of England (except Papists and Unitarians) were allowed freely to assemble for

(*g*) The figures are given in Whitaker's Almanack. It is often claimed that dissenters are members of the Church of England. They have certain rights in their parish church (*Taylor* v. *Timson* (1888), 20 Q. B. D. 671), but they are not therefore in law members of the Church of England. See *Re Perry Almshouses*, [1898] 1 Ch. 391.

religious worship according to their own forms, and in places of meeting duly certified (*h*), on condition, however, of their taking the oaths of allegiance and of supremacy, and making a declaration against transubstantiation, and (in the case of dissenting *ministers*) subscribing also to certain of the Thirty-nine Articles. By the Nonconformists Relief Act, 1779, dissenting preachers or teachers were entitled to the benefits of the Toleration Act (without signing any of the Articles), on subscribing a declaration professing themselves to be Christians and Protestants, and expressing their belief that the Scriptures contain the revealed will of God, and the rule of doctrine and practice. Then, by the Places of Religious Worship Act, 1812, the Act against Conventicles was repealed, and dissenters were relieved from the necessity of taking any oaths or subscribing any declaration, unless required so to do by some justice of the peace ; and by the 53 Geo. III. (1813), c. 160, that clause of the Toleration Act, which excepted Unitarians from the benefit of its enactments, was repealed, and, by the Nonconformists Chapels Act, 1844, the benefits of the above three Acts, viz., the Toleration Act, the Nonconformists Relief Act, 1779, and 53 Geo. III. c. 160, were extended to endowments for dissenters made prior to those Acts. Ultimately, in order to render the benefits of the Universities of Oxford, Cambridge, and Durham more freely accessible to the nation, it was, by the University Tests Act, 1871, enacted, that any person might take any degree (other than a divinity degree), in any of these universities, and hold any office therein, or in any college thereof, without either subscribing any article or formulary of faith, or making any declaration or taking any oath respecting his religious belief or profession, or conforming to any religious observance, or attending (or abstaining from) any form of

(*h*) The Toleration Act has been amended by the 18 & 19 Vict. (1854), c. 81, and 19 & 20 Vict. (1856), c. 119, ss. 17, 27.

public worship, or belonging to any specified church, sect, or denomination (*i*).

As regards Roman Catholics, most of the severer penalties and disabilities to which they were at one time subject were removed by the 18 Geo. III. (1778), c. 60, the Roman Catholic Relief Act, 1791, and 43 Geo. III. (1802), c. 30, on condition of their taking such oaths or making such declarations as in those Acts were provided; and, in particular, assemblies for Roman Catholic worship were legalized on condition of their being held in places duly certified (*k*). Later, by the Roman Catholic Relief Act, 1829 (*l*), Roman Catholics were enabled to exercise any franchise or civil right whatever, except in certain cases where their doing so would presumably be prejudicial to Protestantism, as in the case of presenting to a benefice (*m*); and, therefore, since the above statute, Roman Catholics have been able to hold any office whatever, with the following exceptions: viz., the office of guardian or regent of the United Kingdom; of lord chancellor, or keeper of the great seal; of lord chancellor of Ireland; of lord lieutenant, or other chief governor of Ireland; of lord high commissioner to the General Assembly of the Church of Scotland; and any office in the Church of England, or in the Church of Scotland, or in the ecclesiastical courts, or in the universities, colleges, or public schools of this kingdom (*n*). Finally, by other Acts, and principally by the Religious Disabilities Act, 1846, and (as to the Lord Chancellor of Ireland) by the Office and Oath Act, 1867, almost all the personal disabilities of Roman Catholics were removed; and, by the

(*i*) *R.* v. *Hertford College* (1878), 3 Q. B. D. 693.

(*k*) 18 & 19 Vict. (1855), c. 81, s. 2.

(*l*) *The Earl of Shrewsbury* v. *Scott* (1859), 6 C. B. (N.S.) 177; also Test Abolition Act, 1867.

(*m*) 10 Geo. 4 (1829), c. 7, s. 16; and see Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 7.

(*n*) 10 Geo. 4 (1829), c. 7, ss. 12, 16, 17.

Roman Catholic Charities Acts, 1832 and 1860, Roman Catholics have been placed on the same footing as Protestant dissenters, in the matter of property held for religious or charitable purposes.

The Jews, although they also were formerly, even in England, subject to many hardships and degradations (*o*), and long remained under peculiar disqualifications, have, for some time, been relieved of their hardships and degradations, and their disqualifications have mostly been now removed (*p*). But a Jew (although an Englishman born) is still incompetent to fill certain high offices in the state, from which (as we have seen) Roman Catholics also are excluded; and is also (like Roman Catholics) unable to present to any ecclesiastical benefice, the right of appointment to which may belong to any office in her Majesty's gift, which he may happen to fill (*q*).

Thus amply has the law at length provided for the freedom of religious opinions; but, with all this toleration, the rights and pre-eminence of the Established Church are maintained inviolate, and the Church retains, in full possession, all those dignities and endowments, which, at the period of the Reformation, were allotted to her.

(*o*) 2 Inst. 507.

(*p*) Religious Disabilities Act, 1846; Liberty of Religious Worship Act, 1855, s. 2; Jews Relief Act, 1858; 29 & 30 Vict. (1866), c. 22.

(*q*) Jews Relief Act, 1858, s. 4.

CHAPTER III.

OF THE ENDOWMENTS AND PROVISIONS OF THE CHURCH.

WE will now consider the endowments and provisions of the Church. And we shall discuss, first, the property itself of the church; secondly, the estates which ecclesiastical persons may hold therein; and thirdly, the alienation of church property.

I. *The Property of the Church.*—This property consists of lands, advowsons, and tithes (or tithe rentcharge).—And, First, as to CHURCH LANDS:—The boundaries of church lands having been often subject to great uncertainty, the Ecclesiastical Corporations Act, 1832, after reciting that the dignitaries of the different cathedral and collegiate churches and chapels of England and Wales, and the societies of the colleges and halls of Oxford and Cambridge and Winchester and Eton, are proprietors of divers lands, etc., the boundaries or quantities and identity of which are disputed, provides, that it shall be lawful for any of the said dignitaries and societies (with the consents in the Act mentioned), to agree with their tenants or under-tenants, or the owners of adjoining hereditaments, that any such disputed matters shall be referred to arbitration; and by this means, the boundaries and identity may be ascertained.

In almost every benefice, there is a parsonage house, which the incumbent is entitled to occupy; and he is bound to keep it in repair, and is liable for the *dilapidations* thereof, the extent of his liability and the mode of recovering compensation for the dilapidations being now

regulated by the Ecclesiastical Dilapidations Acts, 1871 and 1872 (*a*). But the law has made provision for aiding a beneficed clergyman in repairing or rebuilding his house of residence, or in providing a new one ; for the incumbent may (as we shall presently see) raise money to a limited amount, according to the value of the benefice, by mortgage of its profits, or by sale or exchange of the existing house, for another which is more convenient. And, by the Sale of Advowsons Act, 1856, it is provided, as to advowsons vested in (or in trustees for) *inhabitants*, or other persons forming a numerous class, and deriving no pecuniary advantage therefrom, that the same may be sold by order of such persons, and the proceeds applied to the beneficial purposes therein specified, which include the erection of a parsonage house if there be none, or the rebuilding, repair, or improvement of any parsonage house already existing.

The incumbent of a living is in general seised also of the *glebe*, *i.e.*, of a portion of land attached to his benefice, and forming part of its endowment ; and by the Tithe Act, 1842, the tithe commissioners have power to ascertain and define the boundaries of the glebe lands of any benefice, and (with the consent of the ordinary and patron) to exchange such glebe lands for other lands within the same or any adjoining parish, or otherwise conveniently situated.

The parson is seised also of the fabric or edifice of the church itself ; and in rectories, the chancel, and the churchyard also, are the freehold of the rector (*b*), while in vicarages, the churchyard is the vicar's freehold, and

(*a*) *Jones* v. *Danyerfield* (1875), 1 Ch. D. 438 ; *Gleaves* v. *Marriner* (1876), 1 Ex. D. 107 ; *Caldow* v. *Pixell* (1877), 2 C. P. D. 562 ; *Re Monk* (1887), 35 Ch. D. 583.

(*b*) *Clifford* v. *Wicks* (1818), 1 B. & Ald. 498 ; *Churton* v. *Frewen* (1866), L. R. 1 Eq. 634. This is equally true in the case of churches built under the Church Building and New Parishes Acts. See 19 & 20 Vict. (1856), c. 104, s. 10.

the chancel is the freehold of the impropriator (*c*), who is liable for its repair (*d*). But the disposal of the pews and seats in the church appertains, by law, to the ordinary, that is to say, practically, to the churchwardens, to whom the authority of the ordinary, in this particular, is delegated; the chief pew in the church belonging, however, as of right, to the rector, or (in the case of a vicarage) to the impropriator (*e*). But the consent of the ordinary is still required for the erection of any monument (*f*), although (under the Consecration of Churchyards Acts, 1867 and 1868) the donor of land to be added to any consecrated churchyard may reserve the right of burial therein, and of erecting monuments and grave-stones therein, for himself, his heirs and assigns, for ever. Moreover, an aisle or side chapel in the church, or a pew in its nave, may be granted, by *faculty* of the ordinary, to an individual and his heirs as appurtenant to a particular messuage in the parish; and a man may also prescribe for these, as so appurtenant, without being required to show a faculty (*g*).

Secondly, as to ADVOWSONS.—Advowsons are of the class of hereditaments incorporeal (*h*), an advowson (*advocatio*) being the right of presentation to a rectory, vicarage, or other ecclesiastical benefice; and he who has the right of advowson is called the patron (*advocatus*) of the church (*i*). For, in antient times, lords of manors built

(*c*) Wats. *Clerg. Law*, 391; *Duke of Norfolk* v. *Arbuthnot* (1879), 4 C. P. D. 290; 5 C. P. D. 390; *Hansard* v. *St. Matthew's, Bethnal Green* (1878), 4 P. D. 46.

(*d*) *Neville* v. *Kirby*, [1898] P. 160.

(*e*) *Clifford* v. *Wicks*, *supra*; *Stileman-Gibbard* v. *Wilkinson*, [1897] 1 Q. B. 749.

(*f*) *Beckwith* v. *Harding* (1818), 1 B. & Ald. 508; *Rich* v. *Bushnell* (1827), 4 Hagg. 164.

(*g*) Wats. *Clerg. Law*, 643, 644; *Crisp* v. *Martin* (1876), 2 P. D. 15; *Halliday* v. *Phillips* (1889), 23 Q. B. D. 48.

(*h*) *Vide sup.* bk. ii. pt. i. ch. xxiii.

(*i*) *Mirehouse* v. *Rennell* (1832), 8 Bing. 490.

churches on their own demesnes, endowed them with glebe, and appointed to be paid to the ministers thereof those tithes which before were given to the clergy in common; and he who thus built and endowed a church had of common right a power annexed of nominating any person, canonically qualified, to officiate in that church, of which he was the founder and patron (*k*). And this power is, by derivation of title from the lords of manors, now vested in many cases in other private persons, and in corporations, both lay and ecclesiastical (*l*). But neither an alien nor a Roman Catholic may exercise the rights of a patron, or present to a living; for if an alien purchase an advowson and a vacancy occurs, the Crown presents (*m*), and if a Roman Catholic, the University of Oxford or of Cambridge (*n*). Apparently, a Jew (although unconverted), provided he be the owner of an advowson in his own right, may present to it (*o*); but should such a person hold any office in the gift of the Crown, to which the right of presentation or of appointment to any ecclesiastical benefice is annexed, he may not in such a case present, the right of presentation devolving upon the Archbishop of Canterbury for the time being (*p*).

[Advowsons are either *appendant* or *in gross*. So long as the right of patronage continued annexed to the manor, as some have done from the foundation of the church to

(*k*) Co. Litt. 119 b; Gibs. *Cod.* 7, 57 (2nd ed.).

(*l*) *Keen* v. *Denny*, [1894] 3 Ch. 169. Municipal corporations may not exercise any right of presentation (see *Hine* v. *Reynolds* (1840), 2 Scott, N. R. 394); but, by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 121, 122, they are to sell any advowsons vested in them.

(*m*) Wats. *Clerg. Law*, 105; Naturalization Act, 1870, s. 2, sub-s. (2).

(*n*) Rogers, *Eccl. Law*, 17; 3 Jac. 1 (1605), c. 5; 1 W. & M. (1689), c. 26; Presentation of Benefices Act, 1713, s. 1; *Edwards* v. *Bishop of Exeter* (1839), 5 Bing. N. C. 652; Benefices Act, 1898.

(*o*) *Mirehouse* v. *Rennell*, *ubi sup.*

(*p*) Jews Relief Act, 1857, s. 4.

[this day, the advowson is appendant, and will pass, or be conveyed, as incident and appendant to the manor, by a grant of the manor only, without adding any other words.] But where the advowson has been once separated from the manor by legal conveyance, it is called an advowson *in gross* or at large, being annexed no longer to the manor, but to the person of the owner; and where the inheritance either of the manor or of the advowson has been once thus separately conveyed, the advowson remains for ever afterwards an advowson in gross, and cannot be made appendant again, although it may become appurtenant. An advowson may not now be sold by public auction, unless it be sold in conjunction with the manor or with the land (not being less than 100 acres) with which it is associated (*q*); but before the recent Benefices Act, 1898, not only the advowson itself, but the *next presentation* (or any number of future *presentations*) might have been freely conveyed by the owner during an existing incumbency (*r*). And the grantee of a next presentation so conveyed became, *pro hâc vice*, the patron of the church; and as to either species of patron, if he died *after* a vacancy had happened, the right to present on such vacancy "for the then next turn," (being as it were a fruit fallen,) was considered as personal, and not as real estate (*s*).

However, now, under the Benefices Act, 1898 (*t*), s. 1, the transfer of the right of patronage must be of the whole right of the transferor; and no transfer is valid, unless more than twelve months shall have (at the date of transfer) elapsed since the last admission to the benefice. The transfer must, within one month, be registered in the registry of the bishop of the diocese; but a *transmission*

(*q*) 61 & 62 Vict. (1898), c. 48, s. 1.

(*r*) Co. Litt. 249 a; Plowd. 150; *Alston* v. *Atlay* (1837), 7 A. & E. 289; Rogers, *Eccl. Law*, 9.

(*s*) *Welch* v. *Bp. of Peterborough* (1885), 15 Q. B. D. 432.

(*t*) 61 & 62 Vict. c. 48; and see the Benefices Rules, 1899, W. N. (1899), p. 79.

on death or the like is not to be deemed a *transfer*. Moreover, the exercise of the right of patronage by any patron is subject to the restrictions imposed by the law of *lapse*, and by the law of *simony;* and of each of these subjects, it is now proper to give some account.

[*Lapse* is a species of forfeiture, whereby the right of presentation accrues,—to the ordinary, by neglect of the patron to present; to the metropolitan, by neglect of the ordinary; and to the Crown, by neglect of the metropolitan. For, it being in the interest of religion, and for the good of the public that the church should be provided with an officiating minister, the law gives this right of lapse, in order to quicken the patron, who might otherwise suffer the church to remain vacant (*u*). The period of neglect, after which the title to present by lapse accrues from the one person entitled to the other successively, is six calendar months, that is, 182 days (*x*), exclusive of the day of the avoidance (*y*). But if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in (*z*), the forfeiture accruing whenever the negligence has continued six months in the same person. And if the bishop doth not collate his own clerk immediately to the living on his right by lapse accruing, and the patron presents, though after the six months have elapsed, yet the patron's presentation is good, and the bishop is bound to institute the patron's clerk (*a*). For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. So, also, and for the same reason, if the bishop suffers the presentation to lapse to the metropolitan, the patron

(*u*) 2 Roll. Ab. 54, tit. *Presentment*; Bract. l. 4, tr. 2, ch. 3.

(*x*) Wats. *Clerg. Law*, 109; *Bp. of Peterborough* v. *Catesby* (1608), Cro. Jac. 166; 2 Inst. 360; *Catesby's Case* (1607), 6 Rep. 62; Regist. 42.

(*y*) 2 Inst. 231; Wats. *ubi sup.*

(*z*) Gibs. *Cod.* 769.

(*a*) 2 Inst. 273.

[may present before the archbishop has filled up the benefice; but the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop (*b*). For (unlike the patron) the ordinary had no permanent right and interest in the advowson, but merely a temporary one; and having neglected to make use of it during the time, he cannot afterwards retrieve his neglect. But if the presentation should lapse to the Crown, prerogative here intervenes and makes a difference; and the patron shall not recover his right till the king has satisfied his turn by presentation (*c*).

In case the benefice becomes void by death, or by reason of plurality, the patron is bound at his own peril to take notice of the vacancy, the six months running from the date of the vacancy (*d*); but in the case of a vacancy by resignation or through canonical deprivation, or if a clerk presented be refused for insufficiency, — these being matters of which the bishop alone is cognizant, —the law requires him to give notice thereof to the patron, and the six months date only from the time when such notice is given (*e*); but an *ecclesiastical* patron is not entitled to this notice (*f*). Neither shall any lapse accrue to the metropolitan or the Crown in cases where the bishop is precluded, by his having neglected to give notice to the patron, from himself presenting; for it is universally true, that neither the archbishop nor the Crown shall ever present by lapse, but where the immediate ordinary might have collated by lapse within the six months, and hath exceeded his time (*g*). Also, if the bishop refuse or neglect to examine and admit the patron's clerk (without good reason assigned), he is styled a *disturber*, and shall not have any title to present by lapse; for no

(*b*) 2 Roll. Ab. 368.

(*c*) *Doctor and Student*, d. 2, ch. 36; *R.* v. *Abp. of Canterbury* (1629), Cro. Car. 355.

(*d*) Wats. *Clerg. Law*, 5; Rogers, *Eccl. Law*, 488.

(*e*) 2 Burn, *Eccl. Law*, 157.

(*f*) 2 Roll. Ab. 364.

(*g*) Co. Litt. 344, 345.

[man shall take advantage of his own wrong (*h*). Also, when the right to presentation is litigious (*i.e.*, contested), and an action is brought to try the title, making the bishop a defendant, no lapse accrues until the question of right is decided (*i*) ;] and under the Benefices Act, 1898, s. 5, in reckoning the date for lapse, no account is to be taken of the period intervening between the bishop's refusal under that Act to institute a presentee, and the decision of the court on such refusal, nor, of course, of the period intervening between the presentation and the bishop's refusal to institute. But the Act (s. 6) provides that a patron may not (in respect of the same vacancy) present again the same person whom the bishop has refused; and any such second presentation is declared void.

[*Simony* is the corrupt presentation of any person to an ecclesiastical benefice, for money, gift, or reward (*k*). Divers Acts of Parliament have from time to time been passed to restrain the practice. First, the 31 Eliz. (1588), c. 6, whereby if any patron, for money or reward, or promise of money or reward, presents a person to any benefice with cure of souls or other ecclesiastical benefice or dignity, both the giver and the taker are to be fined, and the presentation is to be void, and the presentee is rendered incapable of ever enjoying the same benefice, and the Crown presents for that turn. Secondly, the 1 W. & M. (1689), c. 16, which provides that no such simoniacal contract shall prejudice the innocent patron in reversion. Thirdly, the Lunacy Act, 1713, whereby if any person, for money or reward, or promise of money or reward, procures the next presentation to any living, and is presented to it thereupon, the offender is made subject to all the ecclesiastical penalties of simony,

(*h*) *Ibid.*

(*i*) Wats. *Clerg. Law*, 112; 2 Burn, *Eccl. Law*, 358.

(*k*) *Baker* v. *Rogers* (1600), Cro. Eliz. 790.

[and is disabled from ever holding the benefice, and the presentation devolves to the Crown.] And by the Clerical Subscription Act, 1865, every person instituted or collated to any benefice, or licensed to any perpetual curacy, lectureship, or preachership, must previously make and subscribe (in addition to the other declarations required by that statute) a declaration that he has not committed simony. The form of this declaration, as appointed by the Benefices Act, 1898 (*l*), and as given in the schedule to that Act, is to the same effect; and (to prevent any evasion) the words of the declaration are very precise.

[Many questions have arisen in our courts with regard to what is, and what is not, simony; and, among others, these points seem to be clearly settled:—1. That the sale of an *advowson*, (whether the living be full or not,) is not simoniacal, unless connected with a corrupt contract or design as to the next presentation (*m*). 2. That to purchase a next *presentation*, the living being actually vacant, is simony, that being expressly in the face of the statutes (*n*). 3. That for a *clerk* to purchase, either in his own name or in the name of another, the next presentation, and be thereupon presented at any future time to the living, is simony (*o*). But that, 4, a bargain by *any other* person for the next presentation, (even should the incumbent be *in extremis*,) if without the privity, and without any view to the nomination, of the particular clerk afterwards presented, is not simony (*p*); and that under any simoniacal contract made with the patron, although the presentation is void (*q*), yet the clerk who is innocent of evil intention

(*l*) 61 & 62 Vict. c. 48.

(*m*) Bac. Alb. tit. *Simony*, 189; *Bishop of Lincoln* v. *Wolferstan* 1763), 2 Wils. 174; 3 Burr. 1504; *Fox* v. *Bishop of Chester* (1829), 6 Bing. 1; *Alston* v. *Atlay* (1836), 6 Nev. & M. 686; *Walsh* v. *Bishop of Lincoln* (1875), L. R. 10 C. P. 518.

(*n*) *Baker* v. *Rogers* (1600), Cro. Eliz. 788; Moor, 914, S. C.

(*o*) *Winchcombe* v. *Bishop of Winchester* (1617), Hob. 165.

(*p*) *Fox* v. *Bishop of Chester* (1829), *ubi sup.*; 3 Bligh (N.S.) 123, S. C.

(*q*) *Whish* v. *Hesse* (1831), 3 Hagg. 659.

is not otherwise prejudiced (*r*). Any agreement contrary to s. 1, sub-s. (3) of the Benefices Act, 1898, is now covered by the declaration against simony contained in the Act.

In addition to these points, we may notice, that it has been an occasional practice for the patron to take from the presentee an engagement (usually called a *resignation* bond) to resign the benefice at a future period, in order to give the patron another opportunity of presenting a clerk. Such engagements, although at one time deemed void, as being simoniacal (*s*), are now, to a certain extent, sanctioned by the law; the Clergy Resignation Bonds Act, 1828, having enacted, that a written promise to resign, if made to the express intent that some particular nominee, or one of two nominees, shall be thereupon presented, shall be valid, subject always to the following conditions, namely: —(1) That where there are two prospective nominees, each of them must be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew of the patron; (2) that the writing shall in all cases be deposited, within two months after its date, with the registrar of the diocese, and be open to public inspection; and (3) that the resignation made in pursuance of such engagement shall be followed by a presentation, within six months, of the person for whose benefit it is made. And these agreements (which were usually called *Resignation Bonds*) are expressly reserved by Schedule I. of the Benefices Act, 1898, and remain valid; although by section 1 of that Act, it is now provided, (1) that any agreement for an exercise of the right of patronage in favour of any particular person, and (2) any agreement, entered into upon the transfer of the right of patronage, for the re-transfer of the right, or for payment of the consideration (or purchase money) otherwise than in cash down, or for

(*r*) 3 Inst. 154; *R.* v. *Bishop of Norwich* (1616), Cro. Jac. 385.

(*s*) *Dashwood* v. *Peyton* (1811), 18 Ves. 27; *Fletcher* v. *Lord Sondes* (1826), 3 Bing. 501; 5 B. & Ald. 835.

the resignation of the benefice in favour of any person, shall be invalid.

Thirdly, as to TITHES.—These are a species of incorporeal hereditaments ; and they are capable of being held either by laymen, in the capacity of impropriators, or by the clergy, in right of their churches (*t*). Tithes are the tenth part of the increase, yearly arising, upon the lands and on the personal industry of the inhabitants of the parish,—the first species being either *prædial*, as in the case of corn, grass, hops (*u*), and wood (*x*), or *mixed*, as in the case of wool, milk (*y*), pigs, etc. (*z*) ; and the second species being *personal*, as in the case of manual occupations, trades, fisheries, and the like. Of prædial and mixed tithes, the tenth was formerly payable in gross ; but of personal tithes, only the tenth part of the clear profits was due, and personal tithes were only due or payable, where and so far as the particular custom of the place authorized the claim (*a*). [Moreover, whatever was not of annual increase (as stone, lime, chalk, and the like) was not in its nature titheable ; nor was tithe demandable (except by force of special custom) in respect of animals *feræ naturæ*.

The establishment of tithes in England was, possibly, contemporary with the planting of Christianity among the Saxons by Saint Augustine about the end of the sixth century ; but the first mention of them, in any written English law, occurs in a canon or decree made in a synod of the year 786 (*b*). And this canon or decree, which at first bound not the laity, was subsequently

(*t*) Bac. Ab. *Tythes* (E). See second report on Local Taxation, 1899, p. 8.

(*u*) *Trimmer* v. *Walsh* (1862), 4 B. & S. 18 ; L. R. 2 H. L. 208.

(*x*) 1 Roll. Ab. 635 ; 2 Inst. 649 ; 5 & 6 Will. 4 (1835), c. 75.

(*y*) *Fisher* v. *Birrell* (1841), 2 Q. B. 239.

(*z*) 2 Roll. Abr. 364 ; Inst. *ubi sup.*

(*a*) Roll. Abr. 635 ; 2 & 3 Edw. 6, c. 13 ; 7 Bro. P. C. 3 ; Com. Dig. *Dismes* (E. 3).

(*b*) Selden, ch. 8, s. 2.

[confirmed in various councils, only a very few years later than the time when Charlemagne established the payment of tithes in France (*c*), when he also made that famous division of them into four parts,—one to maintain the edifice of the church, the second to support the poor, the third for the bishop, and the fourth for the parochial clergy (*d*). And in the laws agreed upon between King Guthrun the Dane and Alfred and his son Edward the Elder, successively kings of England, about the year 900, by the *feudus Edwardi et Guthruni* (which may be found at large in the Anglo-Saxon laws) (*e*), the payment of tithes was *enjoined* under a *penalty* for their non-payment; which agreement was maintained and confirmed by King Athelstan, about the year 930 (*f*).

For some time after the introduction of tithes, though every man was obliged to pay tithes in general, yet he might have given them to what priest he pleased, which were called *arbitrary* consecrations of tithes; or he might have paid them into the hands of the bishop, for distribution by him among the diocesan clergy (*g*). But when dioceses were divided into parishes, the tithes of each parish were allotted to the particular minister of the parish (*h*); but arbitrary consecrations of tithes continued in general use till the time of King John (*i*), whereby the income of the parish priests was often scandalously reduced. Pope Innocent the Third, however, (about the year 1200), in a decretal epistle sent to the Archbishop of Canterbury, and dated from the palace of Lateran (*k*), enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited; which epistle, says Sir

(*c*) A.D. 778.

(*d*) Seld. ch. 6, s. 7.

(*e*) Wilkins, *Leges Anglo-Sax.* p. 51.

(*f*) Wilk. *ubi sup.*; LL. Athel. ch. 1.

(*g*) Seld. ch. 9, s. 4; 2 Inst. 646; *Slade* v. *Drake* (1618), Hob. 296.

(*h*) LL. Edgar. cc. 1 and 2; Canut. ch. 11.

(*i*) Seld. ch. 11.

(*k*) Opera Innocent, III. tom. 2, p. 452; *Steel* v. *Houghton* (1788), 1 H. Bl. 52.

[Edward Coke, bound not the lay subjects of this realm, but, (being reasonable and just) it was allowed of, and so became *lex terræ* (*l*).] And it is now held universally, that tithes, or their equivalent, are due of common right to the parson of the parish, unless there be a special exception.

In some cases, indeed, the vicar, as well as the rector, is entitled to some part of the tithes; but all tithes, *primâ facie*, and by presumption of law, belong to the rector, except such as can be shown to belong to the vicar (*m*). The evidence of this may consist either of a deed of endowment, vesting certain tithes in the vicar, or of such long usage as is sufficient to raise the presumption that an endowment of that description, though now lost, was antiently made (*n*). It sometimes happens, that an endowment of tithes vests all the "small" tithes, *eo nomine*, in the vicar (*o*); and this raises the question, what are *small* and what *great* tithes, to determine which, no clear line of demarcation seems ever to have been drawn. Yet tithes *mixed* and *personal* are universally agreed to be *small* tithes (*p*), which are sometimes called also *privy* tithes (*q*); and, on the other hand, tithes of corn, hay, and wood are generally regarded as *great* tithes (*r*).

We have now to enquire, who may be exempted from the payment of tithes. [And here we must notice, first, that some persons are exempt by reason of some personal privilege; *e.g.*, the Crown, by its prerogative, is discharged from all tithes (*s*). So a vicar shall pay no tithes to the rector, nor the rector to the vicar; the maxim in such cases being, that *ecclesia ecclesiæ decimas non solvit* (*t*). But these privileges are personal, both to the Crown and

(*l*) 2 Inst. 641.

(*m*) *Dawe* v. *Benn* (1823), 1 B & C. 763; 2 Bligh. (N.S.) 83.

(*n*) *Jackson* v. *Walker* (1781), Gwill. 1231; *Elsley* v. *Donnison* (1828), 2 Bligh. (N.S.) 94, 103.

(*o*) Bac. Abr. *Tithes* (K).

(*p*) *Ibid.*

(*q*) *Clee* v. *Hall* (1838), 7 C. & F. 744.

(*r*) Com. Dig. *Dismes*. G. 1.

(*s*) *Wright* v. *Wright* (1591), Cro. Eliz. 511; Bac. Ab. *Tithes* (Q.); 1 Hardr. 315.

(*t*) *Blinco* v. *Marston* (1591) Cro. Eliz. 479; *Wright* v. *Wright*

[clergy, and extend not to their tenant or lessee of the lands (*u*). Secondly, spiritual corporations were always capable of having their lands totally discharged of tithes in various ways (*x*); and if a man can show his lands to have been formerly abbey lands, immemorially discharged of tithes, that will be a good exemption.

Again, any owner of lands may claim an exemption (either partial or total) from tithes, by reason of a *real composition*. This was an agreement made between the landowner and the incumbent (with the consent of the ordinary and the patron), that the lands should, for the future, be discharged from the payment of tithes, by reason of some land or other *real* recompense having been given in lieu and satisfaction thereof (*y*);] and by the Tithe Act, 1832, s. 2, every composition for tithes, which had at the date of that Act been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which had not been thereafter set aside or departed from, was declared valid in law.

[Moreover, prior to the Tithe Commutation Acts, all persons (spiritual or lay) might claim by custom a *modus*, that is, a *partial* exemption from tithes; as where, by immemorial usage, a particular manner of tithing had been allowed, different from the payment of one-tenth of the annual increase. This customary mode of tithing was sometimes a pecuniary compensation, as twopence per acre for the tithe of land; sometimes it was a compensation in work and labour, as that the parson should have only the twelfth cock of hay and not the tenth, in consideration of the owner's making it for him; and sometimes it was, that in lieu of a large quantity of crude or imperfect tithe, the parson should have a less quantity

(1591), Cro. Eliz. 511; Sav. 3; Moore, 910, S. C.

(*u*) *Blinco* v. *Marston*, *ubi sup.*

(*x*) *Wright* v. *Gerrard* (1618), Hob. 309.

(*y*) 2 Inst. 490; 13 Rep. 40.

[when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs, or the like. Any means, in short, whereby the general law of tithing was altered, and a new method of taking tithe was introduced, was called a *modus decimandi*, and operated in law as a limited or partial exemption. But a *modus decimandi*, in order to be valid, must have had the following characteristics :—1. It must have been *certain* and *invariable* (*a*). 2. The thing substituted for tithe must have been beneficial to the *parson* himself (*b*) ; thus, a modus to repair the *church*, in lieu of tithes, was not good, because that was an advantage to the parish only, but to repair the *chancel* was a good modus, for that was an advantage to the parson. 3. It must have been something *different* from the thing compounded for (*c*) ; *e.g.*, one load of hay in lieu of *all* tithe hay was no good modus, for no parson would *bonâ fide* make a composition to receive less than is due in the same species of tithe. 4. A man could not be discharged from payment of one species of tithe, by paying a modus for another (*d*) ; *e.g.*, a modus of one penny for every *milch* cow would discharge the tithe of milch kine, but not of *barren* cattle, for tithe is, of common right, due for both, and therefore a modus for one would not be a discharge for the other. 5. The recompense must have been in its nature as durable as the tithes discharged by it (*e*). And therefore a modus that every *inhabitant* of a house should pay fourpence a year in lieu of the owner's tithes, was no good modus ; for possibly the house may not be inhabited, and then the recompense would be lost. 6. The modus must not have been too large, for in that case it was a *rank* modus, and the alleged custom establishing it would have been bad.]

(*a*) *Towerson* v. *Winyet* (1675), 1 Keb. 602.

(*b*) 1 Roll. Abr. 649.

(*c*) *Sheppard* v. *Penrose* (1678), 1 Lev. 179.

(*d*) *Gryeman* v. *Lewes* (1590), Cro. Eliz. 446 ; *Startupp* v. *Dodderidge* (1706), Salk. 657.

(*e*) (1728), 2 P. Wms. 462.

Lastly, an exemption from tithes (either total or partial) might have been claimed under the Tithe Act, 1832, on the ground of *long usage*, that is, such usage as can be shown to have lasted for a certain period of time, even though short of the time of legal memory. For, by that Act, tithe claimed by a lay person (not being a corporation sole), or by a corporation aggregate, may be defeated in general by a usage for thirty years; and when claimed by an ecclesiastical corporation sole, may be defeated in general by a usage for sixty-three years (*f*).

But the law on the subject of *modus*, which applies only to tithes payable in kind, has now, though still nominally in force, become practically obsolete. For since the year 1836, a system has been largely carried out for the commutation of tithes into tithe rentcharge under the provisions of the Tithe Commutation Act, 1836, and the various statutes since passed for the amendment of that Act (*g*). This commutation may be effected in two ways; either, first, by a voluntary parochial agreement entered into by a certain proportion of the parties interested, and confirmed by the board of commissioners to whom this subject has been entrusted (*h*), or, secondly, by a compulsory award. The basis of the commutation is, in general, the clear average value of the tithes of the parish

(*f*) *Salkeld* v. *Johnston* (1849), 1 Ha. 196; S. C., 1 Mac. & G. 242; *Dean of Ely* v. *Cash* (1846), 15 M. & W. 617; *Dean of Ely* v. *Bliss* (1852), 2 De G. M. & G. 459.

(*g*) These are 7 Will. 4 & 1 Vict. (1837) c. 69; 1 & 2 Vict. (1838) c. 64; 2 & 3 Vict. (1839) c. 62; 3 & 4 Vict. (1840) c. 15; 5 & 6 Vict. (1842) c. 54; 9 & 10 Vict. (1846) c. 73; 10 & 11 Vict. (1847) c. 104; 23 & 24 Vict. (1860) c. 93; 41 & 42 Vict. (1878) c. 42; 45 & 46 Vict. (1882) c. 37; 48 & 49 Vict. (1885) c. 32; 49 & 50 Vict. (1886) c. 54; 54 & 55 Vict. (1891) c. 8; 60 & 61 Vict. (1897) c. 23.

(*h*) Tithe Act, 1836, s. 2. This board has been since consolidated with that of the Inclosure and Copyhold Commissioners. These commissioners were afterwards called the Land Commissioners (45 & 46 Vict. (1882) c. 38, s. 30); and are now called the Board of Agriculture (52 & 53 Vict. (1889) c. 30).

—or of the composition payable for the same, where they have been compounded for—for the period of seven years, ending Christmas, 1835 (*i*); and the payment of the tithe-commutation is to be half-yearly, and the amount thereof is to fluctuate according to the price of corn. The machinery for ascertaining that price is as follows. In January every year, an advertisement is inserted in the London Gazette, under the authority of the Board of Trade, stating the average price of British wheat, barley, and oats for the seven years ending on the Thursday before the Christmas-day then last preceding (*k*); and every half-year's payment by each parish is to vary so as always to equal the then value (according to the price as so ascertained) of the number of bushels of wheat, barley, and oats, in equal shares, which could then be purchased (according to the prices advertised in January, 1837) by the sum for which the parish tithes were commuted (*l*). And the Acts provide for the *apportionment* of the total parochial rentcharge (under the superintendence of the commissioners) among the parish lands, having regard to their average titheable produce and productive quality. After the apportionment has been confirmed, the lands are absolutely discharged from the payment of tithes, and instead thereof are liable for their proportion of the tithe rentcharge (*m*); and the Acts provide also facilities for the *redemption* of the tithe rentcharge, at the price of not less than twenty-five years' purchase (*n*).

The remedy for the recovery of tithe rentcharge used to be by distress and entry only, and not by any sale of the lands (*o*); and, apparently, no action of debt lay for the

(*i*) Act of 1836, amended by the Corn Returns Act, 1882 (45 & 46 Vict. c. 37), s. 10.

(*k*) Act of 1836, s. 56.

(*l*) *Ibid.*, s. 67; Act of 1840, s. 20.

(*m*) Act of 1836, ss. 33, 54, 67; Act of 1860, ss. 15—17.

(*n*) Act of 1846; Act of 1860, ss. 32—39; Act of 1878, ss. 3, 4; Act of 1885; Act of 1886.

(*o*) *Bailey* v. *Badham* (1885), 30 Ch. D. 84.

arrears of tithe rentcharge (*p*). And even under the provisions of the Tithe Act, 1891, whereby the tithe rentcharge is for the future made payable by the *landowner*, and any future contract of the tenant to pay it is made void (*q*), the remedy is still only against the land, and not against the person; being either a distress, where the owner is in occupation of the land, or a receiver of the rents and profits, where he is not in occupation (*r*). But the Act of 1891 does not apply to the rentcharge payable under the Extraordinary Tithe Redemption Act, 1886 (*s*); the recovery of which is still, apparently, governed by the provisions of the Tithe Act, 1836. But, subject to agreements existing at the passing of the Extraordinary Tithe Redemption Act, 1886, the rentcharge thereby created is made payable by the landlord. And as regards extraordinary tithe, the Act of 1886 directs (sect. 1), that it shall not be levied on any newly cultivated hop-grounds, orchards, fruit plantations, or market gardens; and provision is made (by section 3) for the commissioners ascertaining the *capital value* of the charge on each farm or parcel of land liable thereto. Upon such capital value, when certified by the commissioners, a rentcharge at the rate of four per cent. is made payable (by section 4) in lieu of, and with the same incidence as (*t*), the extraordinary charge; and such statutory rentcharge is made redeemable on payment by the landowner at the capital value as so certified as aforesaid (sect. 5).

Unless by special provision in the parochial agreement, the Tithe Acts do not extend to Easter offerings, mortuaries, or surplice fees; nor to tithes of *fish*; nor (in general) either to *personal* or to *mineral* tithes (*u*); nor

(*p*) *Griffinhoofe* v. *Daubuz* (1854), 4 E. & B. 230; Tithe Act, 1836, s. 67.

(*q*) Sect. 1.

(*r*) Sect. 2. The proceedings are in the county court.

(*s*) 49 & 50 Vict. c. 54.

(*t*) Act of 1897.

(*u*) Act of 1836, s. 90; Act of 1839, s. 9.

to payments in lieu of tithes in London (*x*) ; nor to *ad valorem* tithe payments in any city or town under any custom or private Act ; nor to any tithes commuted under any former statute. It follows, therefore, that the former tithe law still retains some importance, and requires to be noticed ; at the same time, some branches of that law have for all practical purposes been now superseded, it being provided by the Tithe Commutation Acts, that if any question shall arise as to any composition real, modus, or exemption from tithe, in respect of any of the lands in any parish, such question shall be settled in the manner provided by these statutes. And in the parochial agreement, or award of the commissioners, due allowance is to be made for every modus or exemption that shall be so established (*y*).

II. *As to the estates of the clergy in their benefices.*— With regard to these, it is to be remarked, that the clergy differ from ordinary proprietors in several particulars. For all ecclesiastical persons take lands and hereditaments, when granted to them for the use of the benefice in perpetuity, to hold to them and their *successors*, instead of their *heirs* (*z*) ; but the estate of a *rector* or *vicar*, though perpetual as regards his church, is, as regards himself personally, considered for most purposes as an estate for life only, with the fee simple in abeyance (*a*). Ecclesiastical persons cannot as such be seised in tail, nor can they (if *sole*) acquire personalty in their corporate capacity (*b*) ; and they cannot in general hold lands without a licence in

(*x*) 37 Hen. 8 (1545), c. 12 ; 22 & 23 Car. 2 (1671), c. 15 ; 44 Geo. 3 (1803), c. lxxxix. ; 1 Geo. 4 (1820), c. lix. ; 4 Geo. 4 (1823), c. cxviii. ; 6 Geo. 4 (1825), c. clxxvi. ; 7 Geo. 4 (1826), c. liv. and c. cxv. ; 44 & 45 Vict. (1882), c. cxcvii. ; *Payne* v. *Esdaile* (1888), 13 App. Ca. 613.

(*y*) Act of 1836, ss. 21, 24, 44, 45 ; *Barker* v. *Tithe Commissioners* (1843), 11 M. & W. 320.

(*z*) 3 Inst. 202 ; Co. Litt. 300 ; Wats. C. L. 372.

(*a*) Co. Litt. 341 d.

(*b*) *Power* v. *Banks*, [1901] 2 Ch. 487, at p. 495.

mortmain (*c*), though there are many statutory exceptions to this latter disability (*d*).

[III. *As to the alienation of church property.*—At common law, though an ordinary tenant for life could make no alienation to hold good beyond his own life, yet some tenants for life, where the fee simple was in abeyance, might (with the concurrence of such as had the guardianship of the fee) make leases of equal duration with those granted by tenants in fee simple ; and this, in particular, was the case in regard to incumbents of livings, whether rectors or vicars, provided they obtained the consent of the patron and ordinary (*e*), or (in case the living was donative) the consent of the patron alone (*f*). So also bishops and deans, and such other sole ecclesiastical corporations as were seised of the fee simple of lands in their corporate right, might (with the concurrence and confirmation of such persons as the law required) have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. Such leases or estates might have been made by archbishops and bishops, with the confirmation of the dean and chapter ; and by deans, archdeacons, and prebendaries, with the confirmation of the bishop and chapter (*g*), although, if the deanery was donative, the consent of the king alone was required (*h*). And corporations aggregate (*e.g.*, a dean and chapter) might have made what estates they pleased in their church or other

(*c*) Wats. C. L. 372, 374.

(*d*) 29 Car. 2 (1677), c. 8 ; Queen Anne's Bounty Act, 1706, s. 4 ; 1714, ss. 4, 21 ; Clergy Residences Repair Act, 1776 ; Queen Anne's Bounty Act, 1803 ; Gifts for Churches Act, 1811 ; Glebe Exchange Act, 1816 ; Clergy Residence Act, 1826 ; Augmentation of Benefices Act, 1831 ; Church Building Acts, 1838, 1839 ; Queen Anne's Bounty Act, 1840 ; Ecclesiastical Commissioners Act, 1841 ; Episcopal and Capitular Estates Acts, 1851 and 1859 ; Ecclesiastical Leasing Act, 1858, s. 2.

(*e*) Co. Litt. 44 ; Bac. Ab. *Leases* (E.) ; *Vivian* v. *Blomberg* (1836), 3 Bing. N. C. 311.

(*f*) 1 Roll. Abr. 481.

(*g*) *Dean of Ely* v. *Stewart* (1740), 2 Atk. 44 ; Wats. C. L. ch. 44.

(*h*) Comp. *Incumb.* 371.

[lands, without the confirmation of any other person whatsoever. But the powers of ecclesiastical persons in regard to alienation have now been greatly altered by statute.

For, first, by the *enabling* statute 32 Hen. VIII. (1540) c. 28, persons seised *in fee simple* in right of their churches might make leases for three lives or twenty-one years, so as to bind their successors, provided they observed the several requisites and formalites prescribed by that statute; but by the *disabling* statute, 1 Eliz. (1559) c. 19, all grants or leases by archbishops and bishops were made void, unless they were for no longer terms than twenty-one years or three lives from the making, and unless they reserved, at the least, the old accustomed yearly rents. Secondly, by force of the statute 13 Eliz. (1571) c. 10 (explained and enforced by the statutes 14 Eliz. (1572) cc. 11 and 14, and 18 Eliz. (1576) c. 11), ecclesiastical corporations, such as cathedrals, collegiate churches, and the like, including also parsons, were restrained from making any grants or leases of their lands, unless under the following regulations:—(1.) They must not, in general, have exceeded twenty-one years, or three lives, from the making; (2.) The accustomed rent, or more, must have been reserved thereon; (3.) Where there was an old lease in being, no concurrent lease could have been made, unless where the old one would expire within three years; and (4.) No lease was to be made without impeachment of waste. Thirdly, ecclesiastical persons with cure of souls were restrained from *charging* their benefices so as to render them liable for any payment thereout, even in their own time (*i*); and this was by force of the statute 13 Eliz. (1571) c. 20, under which statute it was held, that an instrument framed as a lease, but amounting in substance and design to a charge, was illegal and void. And not only a completed charge, but

(*i*) Bac. Abr. *Leases* (F.).

[any voluntary agreement to charge, was equally void (*k*).] But loans made to incumbents by the Governors of Queen Anne's Bounty are now excepted from the 13 Eliz. (1571) c. 20.

Such, from the reign of Queen Elizabeth to that of King William the Fourth, continued to be the state of the law in this matter, subject only to the partial relaxations from time to time introduced by various Acts of Parliament. But in the reign last mentioned, a new series of statutes on the subject of alienation by ecclesiastical persons commenced; and this legislation has continued also (more or less) throughout the past and present reigns.

First, by the Ecclesiastical Leases Act, 1836 (as amended by another Act of the same session), relative to the *renewal* of church leases, no ecclesiastical corporation may grant any new lease by way of renewal, until one or more of the persons for whose lives it was granted shall be dead; and then only for the surviving life or lives, together with such new life or lives as shall make up the number, not exceeding three, for which the original lease was granted. And where the previous lease was for forty, thirty, or twenty-one years, the renewed lease may not be granted until fourteen, ten, or seven years of the first term shall have expired respectively; and there can be no renewal for life, where the original lease was for years only.

Secondly, by the Ecclesiastical Leases Act, 1842 (with reference to *farming* leases) an incumbent may, with the consent of his patron and bishop, demise for a term not exceeding fourteen years any part of the glebe or other church land, provided the best rent that can be gotten be reserved, and be made payable quarterly, and provided no fine or foregift be taken for the lease, and the lessee be

(*k*) *Hawkins* v. *Gathercole* (1855), 24 L. J. Ch. 332; *Ex parte Arrowsmith* (1878), 8 Ch. D. 100; *McBean* v. *Deane* (1885), 30 Ch. D. 520.

not made dispunishable for waste, and the lease contain such covenants as to cultivation, management, and other matters, as the Act particularly specifies (*l*). But no such lease is to be valid, unless it excepts the house of residence, and at least ten acres of land (*m*).

But, thirdly, by the Ecclesiastical Leasing Act, 1842, the lands or houses of a benefice may now be demised on an improving and repairing lease for any term not exceeding *ninety-nine* years; and leases or licences with respect to watercourses, wayleaves, railroads, and other like easements upon or over the property (*n*), or with respect to the mines, minerals, or quarries (*o*), of ecclesiastical persons, may be made or granted, the provisions of the Act being duly observed. And by the Capitular and Episcopal Estates Act, 1851 (*p*), ecclesiastical corporations may, with the approval of the Church Estates Commissioners, sell to their lessees the reversion of the corporation in the premises comprised in the lease; or may enfranchise any copyhold or customary land held of any manor belonging to the corporation; or may effect exchanges with their lessees; or may, on the other hand, purchase the interest of such lessees in any corporation lands, or the interest of any holder of copyhold or customary land belonging to the manor. And by the Ecclesiastical Leasing Act, 1858, the Ecclesiastical Commissioners may approve under their seal the lease of any part of the lands or other property of any ecclesiastical corporation, aggregate or sole, (except such as are in the Act specially excepted,) for such considerations, and for such terms, and under such covenants or agreements on the part of the lessees, and generally in such manner as to the commissioners shall seem advisable. But, by the Ecclesiastical

(*l*) 5 & 6 Vict. c. 27, s. 1.
(*m*) Sect. 2.
(*n*) 5 & 6 Vict. c. 108, s. 4.
(*o*) Sect. 6; *Doe* d. *Brammall* v. *Collinge* (1849), 7 C. B. 939
(*p*) Amended by Acts of 1854, 1858, 1859; and Ecclesiastical Commissioners Acts, 1860 and 1868.

Commissioners Act, 1860, no lands assigned by the Ecclesiastical Commissioners as the endowment of any see may be granted by the archbishop or bishop otherwise than from year to year, or for a term of years in possession not exceeding twenty-one years, at the best annual rent that can be reasonably gotten, without fine, the lessee not to be dispunishable for, or exempted from liability in respect of, waste. And in every such lease, such or the like covenants, conditions, and reservations are to be entered into, reserved, or contained for the benefit of the archbishop or bishop and his successors, as under the Ecclesiastical Leases Act, 1842, are to be contained in a lease for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit. But the archbishop or bishop may, with the approval of the Church Estates Commissioners, grant mining or building or other leases, for such periods, upon such considerations, and generally in such manner as he may think fit; and a portion of the rent reserved on any such lease may be made payable to the Ecclesiastical Commissioners (*q*).

Finally, by the Glebe Lands Act, 1888 (*r*), the incumbent of any benefice is enabled, on due notice to the bishop of the diocese and to the patron, and with the approval of the Board of Agriculture, to procure *a sale* of the glebe lands, except the parsonage house and the outbuildings, and garden or other land necessary for the convenient enjoyment thereof. If, however, the bishop or patron objects to the sale, and the Board should consider the objection a good one, the sale is not to proceed (ss. 2, 3). But if a sale is effected, the land is sold free from all incumbrances thereon (s. 6), and also from all annual charges (s. 7); these incumbrances and charges being respectively transferred to the sale proceeds, which proceeds are payable to the Board of Agriculture (s. 4), who

(*q*) 23 & 24 Vict. c. 124, ss. 2–8.

(*r*) 51 & 52 Vict. c. 20.

duly invest the same in the names of the Ecclesiastical Commissioners, to be held upon the same trusts as those to which the lands themselves before sale were subject (s. 4).

It now only remains to consider *Surplice Fees*, being fees payable on burials, marriages, and the like, all fees on baptisms being now prohibited (*s*); *Easter Offerings*; and *Mortuaries*; all of which are called *oblations*, and are of great antiquity, having been, indeed, at one time, almost the whole revenue of the Church, until tithes were added.

(1.) With respect to *Surplice Fees and Easter Offerings*. —It is said, that no surplice fees are due to the minister as of common right, but that they depend upon special custom only (*t*); while as to Easter offerings, it has been laid down, that they are due of common right to him who exercises the spiritual functions of the parish, at the rate of twopence per head, for all the parishioners of the age of sixteen and upwards (*u*). The liability to pay oblations, generally, is recognized by the statute law; for by the 2 & 3 Edw. VI. (1548), c. 13, it was provided, that all who, by the laws and customs of the realm, ought to pay offerings, should yearly pay them to the incumbent of the parish at the four most usual offering days, or otherwise at Easter. And by the 7 & 8 Will. III. (1695), c. 6, and the Ecclesiastical Courts Act, 1813, it was further provided, that every one should henceforth pay all offerings, oblations, and obventions to those persons to whom they are due (*x*); and oblations are made recoverable before two justices of the peace, where the amount does not exceed 10*l*. But

(*s*) Baptismal Fees Abolition Act, 1872.

(*t*) Com. Dig. *Dismes* (B. 1); *Andrews* v. *Cawthorne* (1745), Willes, 536.

(*u*) *Laurence* v. *Jones* (1724), Bunb. 173; *Egerton* v. *Still* (1725), *ib.* 198. But see *R.* v. *Hall* (1866), L. R. 1 Q. B. 632.

(*x*) *Ayrton* v. *Abbott* (1849), 14 Q. B. 1; Willes, 538 (n.).

no oblations can be recovered, otherwise than before justices, unless the amount exceeds 10*l.* (or, in the case of Quakers, 50*l.*) ; or unless some matter *of title* comes in question. Also, in churches and chapels built under the Church Building Acts, or the New Parishes Acts, of which we shall presently speak more at large, the payment both of fees and of offerings, to the minister and clerk respectively, is specifically provided for (*y*).

(2.) *Mortuaries* were a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister, in very many parishes, on the death of any of his parishioners (*z*). [They seem originally to have been, like lay heriots, only a voluntary bequest to the Church, being intended (as Lyndewoode informs us) as a kind of expiation and amends to the clergy, for the personal tithes and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, after the lord's heriot or best good was taken, the second best chattel was reserved to the Church as a mortuary (*a*) ; and in the laws of King Canute, this mortuary is called soul-scot, or *symbolum animæ* (*b*). It was antiently usual in this kingdom to bring the mortuary to church, along with the corpse when it came to be buried ; and thence it is sometimes called a *corse-present*, a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry the Third, it had grown into an obligation ; and bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels (*c*). The custom varied in different places, not only as to the mortuary to be paid, but as to the person to whom it was payable. In Wales, a mortuary or corse-present was due

(*y*) As to the Church Building Acts, *vide post*, p. 707 ; as to the New Parishes Acts, *post*, p. 710.

(*z*) 2 Inst. 491.

(*a*) Co. Litt. 185 ; Provinc. l. 1, tit. 3.

(*b*) C. 13.

(*c*) Bract. l. 2, ch. 26 ; Flet. l. 2, ch. 57.

[upon the death of every clergyman to the bishop of the diocese; but this was abolished, upon a recompense given to the bishop, by the statute 12 Ann. (1713), st. 2, c. 6. In the archdeaconry of Chester, a custom once prevailed, that the bishop should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring (*d*); but this mortuary also was directed to cease by the 28 Geo. II. (1754), c. 6, which settled upon the bishop an equivalent in its room.

The variety of customs with regard to mortuaries giving frequently a handle to exactions on the one side, and to frauds or expensive litigation on the other, it was thought proper, by the 21 Hen. VIII. (1529), c. 6, to reduce them to some kind of certainty. For this purpose, that statute enacted, that all mortuaries or corse-presents to parsons of any parish should (unless where by custom less or none at all was due) be taken in the following manner:—viz., for every person dying therein who did not leave goods to the value of ten marks, nothing; for every person who left goods to the value of ten marks, and under thirty pounds, 3*s.* 4*d.*; if above thirty pounds, and under forty pounds, 6*s.* 8*d.*; if above forty pounds, of what value soever, 10*s.* and no more. And no mortuary was to be paid, in any parish, in respect of a *feme covert*, nor in respect of any child or person not being a householder therein, nor in respect of any wayfaring man, whose mortuary was to be paid in the parish in which he had his usual residence. And upon this statute stands the law of mortuaries to this day.]

(*d*) *Hinde* v. *Bishop of Chester* (1631), Cro. Car. 237.

CHAPTER IV.

OF NEW ECCLESIASTICAL DISTRICTS AND PARISHES, AND OTHER EXTENSIONS OF THE ORIGINAL CHURCH ESTABLISHMENT.

THE spiritual ministrations of the Church are mainly entrusted to the parochial clergy ; in other words, to the rectors and vicars of the different parishes of which the realm is composed, together with the curates whom they employ for their assistance. Each parish contains a church, the parochial division of the kingdom being indeed itself referable to the establishment of churches therein ; and there are, comparatively, but very few and scanty portions of territory which have remained extra-parochial.

But in certain parishes, together with the church, *chapels* were at an early period founded, in which divine service, and (in some instances) the rites of sacrament and burial, might be lawfully celebrated, in the same manner as in the parochial churches themselves. Such chapels are of various descriptions. Some are *private* (*a*), being erected for the use only of particular persons of rank, to whom this privilege was conceded by the proper authorities ; and such chapels are free from the control of the incumbent of the parish church (*b*). Others are *public*, and designed for the benefit of particular districts lying within the parochial ambit ; these latter having been, in general, founded at some date later than the parish church

(*a*) *Chapman* v. *Jones* (1869), L. R. 4 Exch. 273 ; *Duke of Norfolk* v. *Arbuthnot* (1879), 4 C. P. D. 290 ; 5 C. P. D. 390.

(*b*) Private Chapels Act, 1871. This Act only refers, however, to chapels belonging to institutions.

itself, for the accommodation of such of the parishioners as lived too far from the parish church, whence public chapels so circumstanced are described as *chapels of ease*. All public chapels are, in general, subject to the control of the incumbent of the parish church, although (under the Church Building Acts, 1831 and 1838) they may be made independent. But there are some chapels of ease which seem to have been coeval with, and always independent of, the parish church, and to have been designed for the benefit of some particular districts never included within the pale of the parish church, though locally embraced by the parochial division (*c*). Chapels of ease are either *parochial*, in which both divine worship and the rites of sacrament and burial are performed, or *mere* chapels of ease, and designed for divine worship only. But as to chapels of ease of both descriptions, these doctrines equally prevail, that of common right the nomination to them is in the incumbent of the parish church, and cannot be taken from him except by agreement between himself, the patron, and the ordinary (*d*); and that the establishment of a chapel of ease in any parish does not of itself deprive the inhabitants accommodated therein of the right of resorting to the parish church, nor, on the other hand, does it exempt them from any parochial burthen to which they would otherwise be liable (*e*). Whence also it is, apparently, that the rector or vicar may, under the provisions of the Augmentation of Benefices Act, 1831, and the District Church Tithes Act, 1865, annex or appropriate to any such chapel of ease portions of the endowments proper of the parish church.

There are also certain chapels which are called *free chapels*, because not liable to the visitation of the ordinary; and these (it is said) are always of royal foundation, or

(*c*) *Craven* v. *Sanderson* (1838), 7 A. & E. 880.

(*d*) *Farnworth* v. *Bishop of Chester* (1825), 4 B. & C. 568; *Dixon* v. *Kershaw* (1766), Amb. 528.

(*e*) *Ball* v. *Cross* (1689), 1 Salk. 165.

else have been founded by private persons by virtue of a Crown licence in that behalf (*f*).

To the number of chapels thus created in antient times, considerable additions have been made in comparatively modern periods; many new chapels of ease (particularly in towns) having latterly been built and endowed to meet the demands of a population beginning to overflow. Among these may be particularly noticed a species of chapel of recent introduction, called *proprietary chapels*, because they are the property of private persons, who have purchased or erected them with a view to profit or otherwise.

But these additions to our regular establishment, though numerous, were not found adequate to the growing wants of the population; and in 1818, the legislature began to apply itself, systematically, to the great object of extending the accommodation afforded by the national Church, so as to make it more nearly commensurate with the wants of the people. A variety of statutes have accordingly been passed for this purpose, which are known by the general denomination of the Church Building Acts (*g*). Under the authority of the first of these Acts, known as the Million Act, the Crown appointed, for a limited period, a body of commissioners called the Church Building Commissioners, who were directed to ascertain where the accommodation of additional churches and chapels was required; and out of the funds placed at their disposal by parliament, to cause such churches as they thought necessary to be built, or to assist the parishioners, or any persons subscribing, with grants or loans of money

(*f*) Wats. C. L. 645; 1 Burn, *Eccl. Law*, 298.

(*g*) 58 Geo. 3 (1818), c. 45; 3 Geo. 4 (1822), c. 72; 5 Geo. 4 (1824), c. 103; 7 & 8 Geo. 4 (1827), c. 72; 1 & 2 Will. 4 (1831), c. 38; 2 & 3 Will. 4 (1832), c. 61; 1 & 2 Vict. (1838), c. 106, ss. 25, 80; c. 107; 2 & 3 Vict. (1839), c. 49; 3 & 4 Vict. (1840), c. 60; 4 & 5 Vict. (1841), c. 38, s. 19; 6 & 7 Vict. (1843), c. 37, s. 24; 7 & 8 Vict. (1844), c. 56; 8 & 9 Vict. (1845), c. 70; 9 & 10 Vict. (1846), cc. 68, 88; 11 & 12 Vict. (1848), c. 37; 14 & 15 Vict. (1851), c. 97; 17 & 18 Vict. (1854), c. 32; 32 & 33 Vict. (1869), c. 94; 47 & 48 Vict. (1883), c. 65.

for the building thereof. Other extensive powers were entrusted to these commissioners, with regard to the division of parishes, (so far as ecclesiastical purposes were concerned,) into separate parishes or separate ecclesiastical districts, and also with regard to many other matters of the same general character. But inasmuch as these statutes contain provisions vastly too numerous and complex for particular notice, and their importance has been partly superseded by the other more recent enactments of which we are about to speak, we shall content ourselves with merely observing that, in the year 1856, the powers of the Church Building Commissioners were transferred to the Ecclesiastical Commissioners (*h*), a body which we have already had occasion to refer to, and of which the origin was as follows.

During the course of the legislation upon church building, and upon the division of parishes for ecclesiastical purposes, the zeal of the nation was also gradually excited for the improvement of our ecclesiastical establishment in other particulars; and in the year 1835, royal commissioners were appointed to consider the state of the several dioceses, with reference to the amount of their revenues, and with a view to the more equal distribution of episcopal duties, to consider also the state of the cathedral and collegiate churches, with a view to the suggestion of such measures as might render them more conducive to the efficiency of the Established Church, and to devise the best mode of providing generally for the cure of souls, and with special reference to the matter of the residence or non-residence of the clergy, and as to pluralities. The report of this royal commission was in due course made, and was followed by an Act of Parliament, the Ecclesiastical Commissioners Act, 1836, incorporating "The Ecclesiastical Commissioners for England," and empowering them to lay before the Crown in council such schemes as might be best adapted to carry into effect the various recommendations contained in the

(*h*) 19 & 20 Vict. c. 55.

report; which schemes, when duly ratified by Order in Council, were to have the same effect as if they formed part of the Act. In pursuance of this provision, the Ecclesiastical Commissioners, who now include all the bishops of England and Wales, and the chief justice, as well as some other persons of distinction (*i*), and who are required to make an annual report to parliament (*k*), have prepared a variety of schemes which have acquired the force of legislative enactments (*l*). Thereby (among many other improvements) various alterations have been made in the arrangement and limits of dioceses; the sees of Gloucester and Bristol have been united, and have been again disunited (*m*), provision has been made for additional bishoprics being established, and for the provision of episcopal residences (*n*), and, in order to augment the income of the smaller bishoprics, contribution has been made from time to time from the revenues of the larger bishoprics, the rights of the existing prelates being saved. Also, by the Ecclesiastical Commissioners Acts, 1840 and 1841, commonly called the Cathedral Acts (*o*), provision has been made for the suspension of a large number of canonries, subject, in certain events, to a power of revival, upon condition of their being newly endowed (*p*); for

(*i*) 3 & 4 Vict. (1840), c. 113, s. 78.

(*k*) 13 & 14 Vict. (1850), c. 94, s. 26.

(*l*) The Acts relating to the Ecclesiastical Commissioners are the following:—3 & 4 Vict. (1840), c. 113, s. 78; 4 & 5 Vict. (1841), c. 39; 6 & 7 Vict. (1843), cc. 37, 77; 7 & 8 Vict. (1844), c. 94; 10 & 11 Vict. (1847), c. 108; 13 & 14 Vict. (1850), cc. 41, 94 (repealed as to sect. 17 by 23 & 24 Vict. (1860), c. 124, s. 1); 14 & 15 Vict. (1851), c. 104; 16 & 17 Vict. (1853), c. 50; 19 & 20 Vict. (1856), cc. 55, 104; 23 & 24 Vict. (1860), c. 124; 29 & 30 Vict. (1866), c. 111; 31 & 32 Vict. (1868), c. 114; 33 & 34 Vict. (1870), c. 39; 36 & 37 Vict. (1873), c. 64; 38 & 39 Vict. (1875), c. 71; 48 & 49 Vict. (1885), cc. 31, 55.

(*m*) 47 & 48 Vict. (1884), c. 66; 59 & 60 Vict. (1896), c. 29.

(*n*) Ecclesiastical Houses of Residence Act, 1842.

(*o*) See also Welsh Cathedrals Act, 1843; 23 & 24 Vict. (1860), cc. 59, 124; 31 & 32 Vict. (1868), c. 114; and 36 & 37 Vict. (1873), c. 39.

(*p*) 3 & 4 Vict. (1840), c. 113, s. 20.

the suppression of all sinecure rectories (*q*) ; for the suppression of certain deaneries (*r*) ; for the vesting of the estates and profits of all such preferments, together with the endowments of non-residentiary prebends, and of some other dignities and offices, in the Ecclesiastical Commissioners (*s*) ; and for the consolidation of all the property so vested, with the accruing interest, into a common fund, to be applied in making additional provision for the cure of souls, in parishes where such assistance shall be most required (*t*). And for the better management of all matters connected with the sale and purchase or leasing of church lands, a special committee of the Ecclesiastical Commissioners has been appointed, called "The Church Estates Commissioners" (*u*).

Provisions of a not less important character, and of a still more recent date, with reference to the same great object of putting the Church into a state of full efficiency, have been made by the New Parishes Acts, 1843, 1844, and 1856, the first and second of them being also sometimes called Sir Robert Peel's Acts, and the third of them the Marquis of Blandford's Act(*x*). The first of these provides, in particular, that the Ecclesiastical Commissioners may form out of the larger and more populous parishes separate districts for spiritual purposes, the scheme being in each case first laid before the incumbent and patron, so as to give them the opportunity of making such remarks thereon or objections thereto as may occur to them (*y*). And upon the district being thus constituted,

(*q*) Ecclesiastical Commissioners Act, 1840, ss. 48, 54 ; Act of 1841, s. 17.

(*r*) Act of 1840, ss. 21, 51 ; Act of 1841, s. 6.

(*s*) Act of 1840, ss. 49, 51 ; Act of 1841, ss. 6, 7.

(*t*) Act of 1840, s. 67 ; Act of 1860, s. 12 ; and see (as regards the Archdeacon of London) 60 & 61 Vict. (1897), c. 45 ; and (as regards the Archdeacon of Cornwall) 60 & 61 Vict. (1897) c. 9.

(*u*) Act of 1850.

(*x*) There are also the New Parishes Acts and Church Building Acts Amendment Acts, 1869 (32 & 33 Vict. c. 94) ; and 1884 (47 & 48 Vict. c. 65), and (as regards the Isle of Man) 60 & 61 Vict. (1897) c. 33.

(*y*) 6 & 7 Vict. c. 37, s. 9.

a minister is to be nominated thereto, with an income of not less than 100*l.* per annum (*z*); and the right of nomination thereto may be assigned to any ecclesiastical corporation, or to the universities of Oxford, Cambridge, or Durham, or to any of their colleges, or to any private person or his nominee or nominees, upon condition of contributing, in a certain proportion, to the permanent endowment of the minister, or towards a church or chapel for the district (*a*). But until the patronage is so assigned, the right of nomination belongs, alternately, to his Majesty and to the bishop of the diocese (*b*); and the charity property of the district may be apportioned between and among the separate districts (*c*). The funds placed in the hands of the Ecclesiastical Commissioners are made available for the purpose of endowing or augmenting the income of the ministers of the new districts, to such an amount, and in such proportion and manner, as the Commissioners may recommend (*d*).

At any time after the constitution of a district, and while it is still unprovided with a church, the bishop is empowered to license any building within the same, for the performance of divine service (*e*). He may also license the nominated minister to perform in the district any pastoral duties, with the exception only of burials and marriages; and the minister so licensed is to be considered as having, to that extent, the cure of souls within the district, and that independently of the incumbent of the parish church (*f*), and he is to be a body corporate, with perpetual succession, by the style of the "minister" of such district. But after a church or chapel has been built or purchased for the district, and approved by the Commissioners by an instrument under their common seal, and duly consecrated, the district

(*z*) *Ibid.*
(*a*) Sect. 20.
(*b*) Sect. 21; Act of 1844, s. 1.
(*c*) Church Building Act, 1845.
(*d*) Act of 1843, s. 19.
(*e*) Sect. 13.
(*f*) Sect. 11.

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